(21)

No. 97-1704-CFX Title: Esteban Ortiz, et al., Petitioners
v.
Fibreboard Corporation, et al.

Docketed: April 17, 1998 Court: United States Court of Appeals for the Fifth Circuit

Entry	Date	Proceedings and Orders
	Apr 17 1998	Petition for writ of certiorari filed. (Response due May 17, 1998)
	Apr 17 1998	40 copies each of 3 volumes of appendices to petition for writ of certiorari filed.
	May 18 1998	Brief of respondents Gerald Ahearn, et al. in opposition filed. VIDED.
	May 18 1998	Brief of respondent Fibreboard Corporation in opposition filed.
	May 18 1998	Brief of respondents Continental Casualty Co, et al. in opposition filed. VIDED.
	May 29 1998	Reply brief of petitioners James Flanagan and David Middleton filed. VIDED.
	Jun 1 1998	Reply brief of petitioners Esteban Ortiz, et al. filed.
	Jun 2 1998	DISTRIBUTED. June 18, 1998
	Jun 22 1998	Petition GRANTED. SET FOR ARGUMENT December 8, 1998. **********
	Jul 6 1998	Record filed.
	Jul 10 1998	Record filed.
	Aug 6 1998	Brief amicus curiae of Trial Lawyers for Public Justice filed.
	Aug 6 1998	Joint appendix filed.
	Aug 6 1998	Brief of petitioners Esteban Ortiz, et al. filed.
	Aug 6 1998	Brief amicus curiae of Association of Trial Lawyers of America filed.
	Aug 6 1998	Brief amicus curiae of Legal Ethics, Civil Procedure, & Constitutional Law Scholars filed.
	Sep 8 1998	Brief amicus curiae of Exxon Corporation filed.
	Sep 9 1998	Brief of respondents Continental Casualty Co, et al. filed.
	Sep 9 1998	Brief of respondents Class Representatives Ahearn, et al. filed.
	Sep 9 1998	Brief amicus curiae of Asbestos Victims of America filed.
	Sep 9 1998	Brief amicus curiae of Natl. Assn. of Securities and Commericial Law Attorneys filed. VIDED.
	Oct 13 1998	Reply brief of petitioners Esteban Ortiz, et al. filed.
	Oct 28 1998	CIRCULATED.
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In the Supreme Court of the United States

OCTOBER TERM, 1997

ESTEBAN ORTIZ, ET AL.,
Petitioners

v.

FIBREBOARD CORPORATION, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the Fed.R.Civ.P. 23(a) requirements of commonality and typicality be met in a Rule 23(b)(1)(B) class action, despite this Court's holdings in *Amchem Products v. Windsor*, by reference to a proposed settlement when the claims alleged in the complaint share no common or typical questions of law or fact, and may such a class be certified under Rule 23(a)(4) despite the existence of structural conflicts of interest—including a conflict between presently injured and future claimants, the same conflict condemned by this Court in *Amchem*?

2. Despite the Rules Enabling Act, the Rules of Decision Act, the teachings of *Amchem* and principles of federalism, may a federal court certify a class action under Rule 23(b)(1)(B), premised upon a "limited fund" contrived by a settlement between the parties, to circumvent the Bankruptcy Code and to alter the substantive state law rights of absent class members?

3. Does the Due Process Clause:

(a) permit a federal court to bind absent class members (including residents of the state where the action is brought) to a class action judgment that alters their *in personam* claims for money damages without giving them a chance to opt out of the class?

(b) permit a federal court sitting in diversity to exercise personal jurisdiction over class members asserting *in personam* claims for damages without giving them a chance to opt out, when those class members lack minimum contacts with the forum state?

4. Can class notice sufficient under the Due Process Clause and Rule 23(e) ever be given to a class that includes unknowing, unidentifiable potential future asbestos victims who have no perceptible injury at the time of the class settlement and notice?

5. Does a federal court have power under Article III to adjudicate a "case" brought by plaintiffs who do not in good faith plead claims they intend to litigate, but who bring suit as a friendly joint venture with the defendants solely to provide a jurisdictional hook on which a federal court agrees to hang a tort reform proposal displacing the laws of 50 states?

PARTIES TO THE PROCEEDING

The petitioners in this case are Esteban Yanez Ortiz, Edee Cochran, Lester E. Taylor, John Allgood and Henry Evers. The defendant is Fibreboard Corporation. The plaintiff class representatives are Gerald Ahearn, James Dennis, Charles W. Jeep, James Ellison, James Drake, and Juanita Drake. The insurers who intervened below are Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company, and Pacific Indemnity Company. The other parties are Roland Dearborn; Judith Dearborn; Kerwin Butcher, Director, Office of Workers' Compensation Programs, U.S. Department of Labor; James Flanagan; David Middleton; Owens-Illinois, Inc.; Bethlehem Steel Corporation; Kenneth Smith; Plant Insulation Company; and Safety National Casualty Corporation.

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OPINIONS BELOW

The opinion of the court of appeals after remand (Appendix A) is reported at 134 F.3d 668. The order of this Court vacating the original judgment of the court of appeals (App. B) is reported at 117 S.Ct. 2503. The original opinion of the court of appeals (App. C) is reported at 90 F.3d 963. The opinion of the court of appeals denying rehearing en banc (App. M) is reported at 101 F.3d 368. The memorandum opinion of the district court approving the class settlement (App. E) is reported at 162 F.R.D. 505. The district court's findings of fact (App. F) and conclusions of law (App. G) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1998. App. 3a. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Pertinent portions of Article III of the U.S. Constitution, the Due Process Clause of the Fifth Amendment, the Rules Enabling Act, 28 U.S.C. § 2072, the Rules of Decision Act, 28 U.S.C. § 1652, and Fed.R.Civ.P. 23 are set forth in Appendix O.

STATEMENT OF THE CASE

Some people just can't take a hint. Last June, in *Amchem Products, Inc. v. Windsor*, 117 S.Ct. 2231 (1997), this Court decertified a nationwide asbestos damages class action consisting entirely of potential future asbestos plaintiffs, and thereby rejected the attempt at judicial legislation embodied in that class action, by holding that the class failed the requirements of both Fed.R.Civ.P. 23(a) and 23(b)(3). The following Monday, this Court granted certiorari in this case, *Ortiz v. Fibreboard*, 117 S.Ct. 2503 (1997), and vacated the Fifth Circuit's decision certifying, under Fed.R.Civ.P. 23(b)(1)(B), a nationwide asbestos damages class action consisting entirely of potential future asbestos plaintiffs. This Court directed the Fifth Circuit to reconsider the case in light of the decision in *Amchem*. App. 36a. Instead, the two-member panel majority below simply issued an unsigned, conclusory, five-paragraph opinion reinstating its prior decision. Making no effort to

reconcile the class certification in this case with either the holdings or the principles of *Amchem*, the Fifth Circuit announced that a future-claimant, settlement-only damages class that could not be certified under Fed.R.Civ.P. 23(b)(3) is perfectly appropriate if the parties, coached by the district court itself, proceed under the guise of Rule 23(b)(1)(B).

The Fifth Circuit has effectively issued an invitation to mass tort defendants nationwide to resolve all their future liabilities in one stroke by filing a "limited fund" settlement-only damages class action in the courts of that circuit—where tort reform by judicial fiat persists despite this Court's resounding condemnation of the practice in *Amchem*. This Court should revoke the Fifth Circuit's invitation and grant certiorari to clarify that federal courts may not circumvent Congress's Bankruptcy Code and the Rules Enabling Act by invoking Rule 23(b)(1)(B) to alter the substantive state-law rights of absent class members simply by asserting a contrived "limited fund"—a fund limited only by what the defendant, solvent but fearing a potential future risk of insolvency, is willing to pay now to resolve its entire future stream of tort liabilities.[1]

1. Background and Settlement Negotiations. Fibreboard's corporate predecessors manufactured and distributed asbestos-containing products for fifty years. By 1988, Fibreboard had exhausted its insurance against asbestos lawsuits with the exception of contested policies issued by Continental Casualty Co. ("CNA") and Pacific Indemnity ("Pacific")("the insurers") covering the years 1957 through 1959. Although both CNA and Pacific disputed coverage for Fibreboard's asbestos liabilities, their potential exposure was unlimited because none of the contested policies had an aggregate limit on coverage. The coverage dispute was litigated by Fibreboard and the insurers in the California state courts.[2]

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[1] As Judge Smith noted in dissent, Fibreboard is "a solvent, ongoing concern" with "solvent insurers," and was in fact acquired in 1997, subsequent to the Fifth Circuit's original decision, by Owens-Corning in a tender offer for $515 million cash, which could expand enormously the assets available to pay Fibreboard's future asbestos liabilities. App. 10a n.11; 13a-14a.

[2] In 1996 the California courts finally resolved the bulk of the contested coverage issues in favor of Fibreboard. *Armstrong World Indus. v. Aetna Cas. & Sur. Co.*, 45 Cal.App. 4th 1, 52 Cal.Rptr. 2d 690 (Cal.Ct.App. 1996), *review denied* (Aug. 21, 1996). Since that decision, the Fifth Circuit has mooted the coverage litigation altogether by affirming the district court's approval of the "Trilateral Settlement Agreement" in the case of *Continental Casualty Co. v. Rudd*. App. 93a-98a. As described below, the Trilateral Agreement compromises Fibreboard's coverage dispute independently of the class settlement in this case.

This asbestos class action began with that insurance coverage dispute. No plaintiff who had been injured by asbestos came forward to file a class action complaint. Instead, the case began when Fibreboard, possessing (a) $225 million in net worth which it wished to protect and (b) the possibility of unlimited insurance coverage under the disputed policies, established a "corporate goal [of] resolv[ing] its asbestos liabilities within its available insurance resources." App. 577a. In 1991, Fibreboard sought out several nationally prominent asbestos plaintiffs' attorneys (hereafter "class counsel") and invited them to negotiate a global settlement of Fibreboard's total potential future asbestos liabilities.

In March 1993, CNA began participating in these negotiations; in August 1993, Pacific came to the negotiating table. On August 9, 1993, the Hon. Robert M. Parker, then Chief Judge of the Eastern District of Texas,[3] issued an order authorizing class counsel to "negotiate [with Fibreboard] the prospect of a Rule 23(b)(1)(B) settlement class composed of future plaintiffs with claims against Fibreboard." App. 45a. *Thus, before a lawsuit was even filed, Judge Parker had appointed class counsel and had directed them to negotiate a class action settlement with the defendant, ostensibly on behalf of unknown representative plaintiffs to be named later*. Judge Parker orchestrated the settlement negotiations, and the critical meetings that produced the final agreement were held at Judge Parker's home. App. 45a-47a. On August 27, 1993, Fibreboard, the insurers and class counsel announced their proposed Global Settlement of all future asbestos claims, which required the insurers to pay $1.525 billion into a settlement trust. App. 46a-47a, 49a.

That same day, the insurers and Fibreboard independently agreed to resolve their insurance coverage dispute with respect to *all*

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[3] After the class action complaint was filed, Judge Parker became a judge of the Fifth Circuit; he continued to sit as district judge in this case by designation.

claims, both present and future, *whether or not the Global Settlement of future asbestos claims received court approval*. App. 46a-47a. This independent Trilateral Agreement, formalized on October 12, 1993, provides that, if the Global Settlement is *not* approved, the insurers will pay Fibreboard $2 billion—half a billion *more* than the insurers' payment to the trust under the Global Settlement—which Fibreboard can then use, in addition to its own assets, to resolve pending and future claims as they are filed in the years to come. Unlike the Global Settlement, the Trilateral Agreement in no way limits the legal rights of asbestos victims with respect to their claims against Fibreboard. App. 51a. The Trilateral Agreement guarantees that Fibreboard will have ample insurance coverage with which to pay future asbestos claims.[4]

On September 9, 1993, the settling parties filed the complaint in *Ahearn v. Fibreboard Corp.*, No. 6:93cv526 (E.D. Tex. 1993), *the class action "lawsuit" they had "settled" two weeks earlier*. App. 552a. Invoking the court's diversity jurisdiction under 28 U.S.C. § 1332 (App. 553a), the complaint alleged claims on behalf of all those who had been exposed to asbestos for which Fibreboard may be liable, but who had not filed, or had dismissed without prejudice, any asbestos-related lawsuit against Fibreboard prior to August 27, 1993, and all past, present, and future spouses, parents, children, and other relatives of such individuals. App. 555a-556a. While the complaint sought damages for the proposed class only against Fibreboard, CNA and Pacific immediately intervened as defendants. App. 567a.

At the same time they filed their complaint, class counsel and the insurers—pursuant to the district court's prior instructions—jointly moved for certification, under Fed.R.Civ.P. 23(b)(1)(B), of a mandatory, nationwide class of *all* potential future asbestos claimants against Fibreboard—including those who

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[4] The insurers filed suit against a defendant class of "future" asbestos claimants (*Continental Casualty Co. v. Rudd*), seeking a declaration that the Trilateral Agreement was fair and reasonable with respect to the defendant class members, who are the potential third-party beneficiaries of the policies. The district court approved the Trilateral Agreement; petitioners neither objected to that agreement nor appealed from the district court's judgment. Although the Fifth Circuit consolidated *Rudd* with this case, following issuance of the panel's decision in the two cases *Rudd* was severed. No party sought rehearing of the *Rudd* decision and the *Rudd* judgment is now final.

currently had no actionable asbestos-related condition. In other words, future asbestos plaintiffs were included in the proposed class even if they had not yet sustained physical injury, had no accrued claims, and were protected by state laws from the running of statutes of limitations on any claims they might develop in the future, while currently injured asbestos plaintiffs who had already sued were simply defined as being outside the class and were thereby *automatically* "opted out" of this supposedly non-opt-out class.

For the few class members who had already developed an asbestos-related disease, the complaint sought damages for personal injuries. For all other class members—the overwhelming majority—who had been exposed to asbestos but had not yet suffered any discernible physical injury, the complaint purported to seek damages for their *risk* of contracting such diseases in the future, for emotional distress arising from the *fear* of contracting future diseases, and for medical monitoring to *detect* those diseases. App. 561a.

On September 9, 1993, the same day that the complaint and joint motion for class certification were filed, Judge Parker provisionally certified the class "for settlement purposes only" under the so-called "limited fund" provision of Fed.R.Civ.P. 23(b)(1)(B). App. 543a. The district court appointed as class counsel the four attorneys who had negotiated the settlement announced on August 27. App. 48a. Three months later, on December 23, 1993, the parties filed the formal settlement document. App. 48a-49a.

2. The Terms of the Global Class Settlement. Although the class complaint of course alleged no unaccrued claims for future personal injuries, *the central feature of the Global Settlement is that all class members release those "claims."* The settlement provides that CNA and Pacific will contribute a total of $1.525 billion to a Trust to be established on behalf of all class members, and that Fibreboard will contribute an additional $10 million (out of its net worth of at least $225 million). In return, Fibreboard is forever released from any lawsuit that class members might bring in the future, and the insurers are released from any responsibility for defending against or indemnifying such claims. App. 49a-50a.

This release of unripe future claims provides the means for Fibreboard to achieve its "corporate goal" (App. 577a) of resolving its asbestos liabilities within the limits of its available insurance. Because the class was certified as a mandatory class under Rule

23(b)(1)(B), class members were given no opportunity to exclude themselves from this compulsory release of their as-yet unaccrued claims. The Global Settlement extinguishes class members' claims even if they received no notice of the settlement and hence were unable to object to it in a timely manner, even if they were unaware of their own exposure to asbestos or of the past exposure of whoever would someday become their parent or spouse, and even if they were not among the tiny fraction of the class that had then suffered any injury.

In return for this forced release of all future, unaccrued claims, class members are allowed the opportunity, if and when they develop an asbestos-related disease, to present a claim through the Alternative Dispute Resolution ("ADR") provisions of the Trust Distribution Process. App. 583a. Once a class member submits a claim and furnishes all necessary information to support that claim, the Trust will make an offer of settlement after completing an initial evaluation of the claim. App. 584a. If the class member accepts such an offer, she will be paid in three annual installments—40 percent in the first fiscal year after the offer has been accepted, and 30 percent in each of the following two years. App. 605a. If the class member rejects the offer, she may then proceed to mediation, non-binding arbitration, and finally a mandatory settlement conference. App. 584a.

Only after enduring all of these delays may a class member finally file a lawsuit against the Trust—and, even then, the Global Settlement imposes significant limitations on that lawsuit, saddling it with what the Fifth Circuit called its "spendthrift provisions." App. 49a. Class members cannot recover punitive damages, pre-judgment interest, or post-judgment interest. App. 584a. They are limited to a maximum of $500,000 in compensatory damages, no matter what damages are assessed by the jury. App. 607a. Even in jurisdictions where the governing substantive law provides for joint and several liability, class members are limited to the portion of liability assigned to the Trust, which stands in the shoes of Fibreboard for purposes of trial. App. 584a. The settlement penalizes any class member who ultimately prevails in court by spreading payment of the judgment in installments over a period of five to ten years, without interest (as compared to the three-year payout for claims resolved by arbitration or settlement before resort to the judicial system). App. 605a-606a.

3. District Court Proceedings. The five petitioners are all members of the plaintiff class who intervened in the district court for purposes of objecting to the proposed Global Settlement. The district court held a hearing regarding the fairness of the settlement but did not conduct a separate hearing on class certification.

On July 27, 1995, the district court reaffirmed its "preliminary" certification of the class pursuant to Rule 23(b)(1)(B). The court held that Rule 23(a)'s requirements of commonality, typicality and adequacy of representation—which of course apply even in 23(b)(1)(B) classes—were met because "all class members share ... common interests [in] maximizing the total settlement [and in] adopting procedures that provide for payments to claimants in an equitable manner." App. 226a-227a. The district court predicated this certification ruling on *Georgine v. Amchem Products*, 157 F.R.D. 246 (E.D.Pa. 1994) (see App. 225a, 228a), and Alba Conte & Herbert Newberg, 2 NEWBERG ON CLASS ACTIONS § 11.28 (3d ed. 1992) (see App. 223a, 225a, 226a). Both of these authorities—and the rule for which the district court cited them—were subsequently repudiated by this Court in *Amchem Products v. Windsor*, 117 S.Ct. 2231, 2247, 2249-50 & n.18 (1997). The district court approved the settlement and awarded the class counsel chosen by Fibreboard a total of $43.7 million in fees. App. 541a-542a.

4. The Fifth Circuit's Initial Decision. A divided panel of the Fifth Circuit affirmed over the outraged dissent of Circuit Judge Jerry Smith. The majority expressly refused to follow the Third Circuit's decision in *Georgine v. Amchem Products,* 83 F.3d 610 (1996), which was subsequently affirmed by this Court in *Amchem Products v. Windsor*, 117 S.Ct. 2231 (1997). App. 55a-56a. Instead, the panel held that a settlement reduces the need to measure a class against Rule 23's requirements (App. 55a-56a) and that the "questions of law or fact common to the class" under Rule 23(a)(2) may be "derived from the settlement rather than from the [plaintiffs'] complaint." App. 56a-57a. The panel further held that Rule 23(a)(3)'s requirement that the "claims or defenses of the representative parties" be "typical" of the class did not mandate reference to the claims actually pleaded in the class complaint, but that "typical" interests, such as the class members' "interests in maximizing recovery for the class and eliminating the risk posed by the insurance coverage litigation" (App. 57a), could instead arise from the settlement itself.

Petitioners argued, and the dissent below agreed, that the class failed the Rule 23(a)(4) requirement of adequate representation because the class was divided by internal conflicts. Most salient was the very same conflict on which the Third Circuit focused in *Amchem*: for the currently injured who possessed extant asbestos claims, the critical goal was to maximize immediate payment of both compensatory and punitive damages; for the exposure-only class members who have no current claim, the critical goals were to cap compensatory damages, to slow payouts, and to eliminate interest payments and punitive damages in order to preserve as much of the fund for the future as possible. App. 145a-148a (citing *Georgine v. Amchem Products*, 83 F.3d at 630-31).

The petitioners (and the dissent) also identified a conflict between those class members injured before 1959 (when Fibreboard had unlimited coverage under its liability insurance policies with CNA and Pacific) and those injured after 1959 (for which there was no remaining insurance and victims could recover only against Fibreboard's own assets). Prior to the settlement, the asbestos claims of pre-1959 victims were enormously more valuable than those of the post-1959 victims. App. 148a-150a. Yet, without separate representation for these antagonistic groups, the settlement sacrificed the fortunate status of pre-1959 claimants to benefit the class as a whole. *Id.*

Finally, the petitioners argued, and the dissent agreed, that class counsel labored under a fatal conflict of interest because, at the same time they were negotiating on behalf of a class of future claimants, they also represented individual asbestos claimants with pre-existing lawsuits, and the interests of those two groups inherently differ over how any settlement should allocate and limit recovery. While the class negotiations were underway, class counsel settled their entire outstanding inventory of thousands of pre-existing asbestos cases against Fibreboard for higher-than-average amounts, *contingent on the approval of a global settlement—on any terms—of all future claims against Fibreboard.* App. 142a-143a. Class counsel thus excluded their entire pre-existing client roster from a supposedly non-opt-out 23(b)(1)(B) class. App. 117a.

The panel majority did not really contest the existence of these conflicts within the class; it simply held that they were

"overwhelmed" by the common interest of all class members in obtaining a settlement. App. 67a-72a.

Despite the fact that the class complaint pleaded, and the settlement released, individual personal injury damages claims against Fibreboard rather than equitable or "*in rem*" claims against a trust or a *res*, the Fifth Circuit upheld the certification of a mandatory class under Rule 23(b)(1)(B) because the mere *possibility* that Fibreboard might *someday* become insolvent created a "'risk' that separate adjudications 'as a practical matter' would 'substantially impair or impede' the interests of the class." App. 78a. The court of appeals held that *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985), does not require that class members be afforded an opportunity to opt out of the class because that same theoretical risk of future insolvency transformed the class action from one seeking classwide disposition of individual tort claims for *in personam* damages into a "unitary," "*in rem*" claim for equitable allocation of a self-imposed limited fund. App. 82a-84a.[5] Petitioners argued that the Rules Enabling Act, 28 U.S.C. § 2072, and related principles of federalism prohibit the federal judiciary from using Rule 23(b)(1)(B) to effect such a *pro rata* adjustment of the class members' substantive state law rights against a defendant that is not in bankruptcy or receivership. But the Fifth Circuit held that its creative use of Rule 23(b)(1)(B) created "a superior alternative to the Bankruptcy Code" (App. 78a) and that it was therefore empowered to "circumvent[]" "the terms and principles of the Bankruptcy Code." App. 78a.

Finally, the court of appeals brushed aside petitioners' arguments that the district court lacked subject-matter jurisdiction to approve this collusive settlement of unaccrued, future damages claims (App. 86a-88a), and that adequate notice can never be given to legions of uninjured class members who may not even know of their exposure to asbestos, let alone be able intelligently to evaluate a proposed settlement so as to decide whether to object. These were

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[5] The court also rejected petitioners' narrower contention that due process at least requires that class members who lack minimum contacts with the forum state of Texas be given an opportunity to opt out, so that their failure to do so might be construed as consent to the court's exercise of personal jurisdiction. App. 81a-84a. *See Shutts*, 472 U.S. at 812.

defects that the dissent deemed insurmountable. App. 113a-116a; 154a-181a.

In dissent, Judge Smith castigated the panel majority for "legislat[ing] a bold and novel tort reform proposal thinly disguised as the settlement of a lawsuit." App. 104a. Indeed, Judge Smith observed, "there never was a lawsuit: Fibreboard and its hand-picked class counsel agreed to file a suit only if they had already settled it." App. 104a. This settlement "is purely legislative: Class members' causes of actions are repealed in favor of the equivalent of a workers' compensation regime." App. 105a.

5. The Fifth Circuit Decision After Remand. This Court vacated the Fifth Circuit's decision and remanded the case for reconsideration in light of *Amchem Products v. Windsor*, 117 S.Ct. 2231 (1997). App. 36a. Over a strenuous dissent, the same panel majority then issued an unsigned opinion just five paragraphs in length, reinstating its prior decision. App. 1a. The court of appeals deemed *Amchem* inapposite because it concerned a Rule 23(b)(3) class, whereas the class here was certified under Rule 23(b)(1)(B). App. 2a.

Amchem, however, had expressly repudiated the panel majority's prior rulings that "settlement obviates or reduces the need to measure a proposed class against the enumerated Rule 23 requirements" and that, "'in the settlement class context, common issues arise from the settlement itself.'" 117 S.Ct. at 2247 (quoting the Fifth Circuit, App. 56a). The Fifth Circuit nevertheless reinstated its decision, based on those repudiated rulings, and again predicated certification on the "equities" of the settlement. App. 2a-3a.

Amchem held that the "benefit asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration, but it is not pertinent" to the certification inquiry under Rule 23(a). 117 S.Ct. at 2249. The Fifth Circuit nevertheless held that the class met the commonality and typicality requirements of Rule 23(a) because the class was united by a "common interest" in "seeking equitable distribution of compensation" under the settlement's dispute resolution process. App. 3a.

Amchem held that a class containing both presently injured asbestos victims and potential future plaintiffs who have merely been exposed to asbestos cannot meet the standard of Rule 23(a)(4)

without the "structural assurance of fair and adequate representation" provided by separate subclass representatives with their own attorneys. 117 S.Ct. at 2251. The Fifth Circuit panel nevertheless upheld certification of a class plagued by the identical conflict here, holding that the existence of such conflict-creating competition for "larger and earlier shares of available money" is "precisely" what makes class certification under Rule 23(b)(1)(B) proper. App. 3a.

In *Amchem* this Court noted its "grav[e]" concern "whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions" who have "no perceptible asbestos-related disease at the time of the settlement" and who "may not even know of their exposure." 117 S.Ct. at 2252 (citing Judge Smith's dissenting opinion below, App. 113a-118a). The Fifth Circuit panel majority simply ignored this question on remand, but necessarily resolved it by implicitly holding notice to be sufficient.

In *Amchem*, this Court began and ended its analysis with the reminder that Rule 23 "must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'" 117 S.Ct. at 2244; *see also id.* at 2248, 2252. The Fifth Circuit panel did not deign to discuss these constraints on remand. The court simply reinstated its prior judgment expanding the Rule 23(b)(1)(B) "limited fund" class action category for the avowed purpose of "circumvent[ing]" the Bankruptcy Code (App. 78a) and "effect[ing] a pro rata reduction" of the class members' substantive state-law tort claims. App.82a. Judge Smith filed a detailed dissent, reiterating his prior criticisms and denouncing the panel majority for flouting this Court's decision in *Amchem*. App. 3a-35a.

REASONS FOR GRANTING THE WRIT

I. THE JUDGMENT BELOW DEFIES *AMCHEM*'S HOLDINGS ON RULE 23(a).

This Court has *already* rejected the Fifth Circuit's application of Rule 23(a) to this settlement class action. In canvassing the differing approaches of the lower courts, the *Amchem* opinion cited the Fifth Circuit's prior opinion in this very case as holding that "settlement obviates or reduces the need to measure a proposed class against the

enumerated Rule 23 requirements." 117 S.Ct. at 2247. That holding was in turn expressly repudiated by this Court: Rule 23(a)'s specifications "demand undiluted, even heightened, attention in the settlement context." 117 S.Ct. at 2248 & n. 16. Because both the district court and the court of appeals below applied this now-rejected reduced standard for class certification, all of their findings and rulings on Rule 23(a)'s requirements are irretrievably tainted by the application of an erroneous legal standard. Yet on remand the Fifth Circuit simply reinstated its prior Rule 23(a) rulings and again deferred to the district court's tainted "conclusions" that Rule 23(a)'s requirements had been met. App. 2a. Surely that will not do.

Amchem also observed that the Fifth Circuit's prior opinion had held that, "'in the settlement class context,'" the issues that bind a class together under Rule 23(a) "'arise from settlement itself.'" 117 S.Ct. at 2247 (quoting the Fifth Circuit at App. 56a). *See also* App. 56a-58a (same). That holding was likewise squarely rejected by this Court in *Amchem*. The questions that must be "common" to and "typical" of the class under Rule 23(a) are the "legal or factual questions that qualify each class member's case as a genuine controversy, questions that *preexist* any settlement." 117 S.Ct. at 2249 & n.18 (emphasis added).[6]

Although the dissenting opinion below grasped and applied this holding on remand (App. 29a, 34a), the panel majority did not. The Fifth Circuit refused to assess class certification in terms of the legal or factual questions in the complaint—the kinds of questions "'that

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[6] The authority of class plaintiffs to represent and bind absent class members under Rule 23 is limited by the scope of the class complaint, which describes the typical claims held in common by the class. Class representatives can release only those claims pleaded in the complaint or claims arising from the very same factual predicate as those pleaded in the complaint. *National Super Spuds v. New York Mercantile Exchange*, 660 F.2d 9, 18-19 & n. 7 (2d Cir 1981) (Friendly, J.). *Matsushita Electric Industrial Co. v. Epstein*, 116 S.Ct. 873, 878-79, 883 (1996), is entirely consistent, because there both the state-law claims and the exclusively federal claims arose from the identical factual predicate involving the same transaction. Since the class plaintiffs here do not, by definition, currently possess actionable "future" claims for asbestos personal injury or wrongful death or lost consortium, they do not plead such claims and cannot release or settle such claims on behalf of the class. 7B Charles Alan Wright, Arthur R. Miller & Mary K. Kane, FEDERAL PRACTICE AND PROCEDURE § 1797.1, at 46-47 (Supp. 1995).

can be raised in courts of law as part of an actual or impending lawsuit,'" 117 S.Ct. at 2249 n.18—and instead purported to find Rule 23(a) commonality and typicality in the class members' supposed "common interest" in "seeking equitable distribution of compensation" under the settlement. App. 3a. The court below thus repeated the very error that this Court's *Amchem* decision had just condemned. As Judge Smith explained, *Amchem* held that a common interest in a fair compromise is not enough. App. 19a-20a, 29a, 31a & n.31. Indeed, Rule 23(a)'s safeguards "serve to inhibit appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness." *Amchem*, 117 S. Ct. at 2248.

Amchem also held that the Rule 23(a)(4) requirement of adequate representation cannot be met where a mass tort class is riven by a conflict between "currently injured" and "exposure-only" potential future plaintiffs. 117 S.Ct. at 2251. The goal of the largest possible immediate payouts for the former class "tugs against the interest of exposure-only plaintiffs in ensuring ample" settlement funds for the future. *Id.* Rule 23 mandates "structural assurance of fair and adequate representation for the diverse groups and individuals affected." *Id.*

> Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency. . . . "The class representatives may well have thought that the settlement serves the aggregate interests of the entire class. But the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups."

117 S.Ct. at 2251 (quoting *In re Joint E. & S. Dist. Asbestos Litigation (Findley I)*, 982 F.2d 721, 742-43 (2d Cir. 1992)).

Precisely the same conflict exists in this settlement class action, and no subclasses with separate representation were created to cure it. App. 22a-24a (Smith, J., dissenting). If anything, as this Court itself observed in *Amchem*, 117 S.Ct. at 2251, the conflict between present and future tort claimants is exacerbated when the settlement

class is treated, as it was here, as "a 'limited fund' case certified under Rule 23(b)(1)(B)." For this settlement's "spendthrift provisions" make crucial decisions about limiting relief for present victims in order to preserve funds for future claimants. App. 26a-27a (Smith, J., dissenting).[7]

The court below *did not really deny the existence of these conflicts* in its original opinion (App. 67a-72a), nor did it try to do so upon remand. App. 3a. Instead, the court of appeals simply characterized this conflict between present and future plaintiffs as "competition for earlier and larger shares of available money," and then held that this intra-class conflict—far from being a problem—is "precisely the reason" for a Rule 23(b)(1)(B) class, where such "conflict" can be "controlled for the benefit of all members of the class" by the district court. App. 3a. The very intra-class conflicts which this Court held to be fatal in *Amchem* were deemed by the Fifth Circuit to be "outweighed" (App. 69a) by each class member's "common interest" in securing, through the settlement, access to an equitable distribution of Fibreboard's available insurance coverage. App. 3a.

This same argument was pressed by the dissent in *Amchem*, which agreed that the conflict between future and presently injured class members was a "serious problem," but insisted that it is precisely this "'real and present danger that the available assets will be exhausted'" before future victims become sick and can recover that makes a class action settlement appropriate, because the district court can supposedly "ensur[e] that the interests of no class members are sacrificed." 117 at 2256 (Breyer, J., dissenting in part). This Court squarely rejected that position: Rule 23(a)(4) mandates "*structural assurance*" of fair representation for diverse groups and

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[7] Structurally inadequate representation is also evident in the way that the settlement "forced the pre-1959 claimants to give up something of value that is legally their due—their cause of action against an insured Fibreboard—in order to benefit a group of claimants to whom they owe nothing." App. 25a.

There was also a conflict of interest on the part of class counsel when they negotiated this supposedly mandatory class action while simultaneously settling thousands of cases for their own clients on separate terms *outside that global settlement*. App. 117a-118a, 142a-145a (Smith, J., dissenting). As Justice Ginsberg noted during the argument in *Adams v. Robertson*, this would appear to create a conflict of interest for class counsel. Tr.Oral Arg. at 36-37.

individuals. 117 S.Ct. at 2251 (emphasis added). The "class certification inquiry does not examine the merits of the tradeoffs created by a settlement, *but examines whether class representatives and class counsel had authority to trade at all*." App. 19a (Smith, J., dissenting) (emphasis added). The Fifth Circuit's astonishing refusal to apply the rules of law laid down by this Court justifies issuance of a writ of certiorari — indeed, it warrants summary reversal.

II. THE RULES ENABLING ACT, RULES OF DECISION ACT, RULE 23 AND PRINCIPLES OF FEDERALISM ALL PROHIBIT MANDATORY CLASS TREATMENT OF THE INDIVIDUAL, *IN PERSONAM* CLAIMS FOR DAMAGES ALLEGED IN THIS CASE.

A possible reason for plenary consideration rather than summary reversal under *Amchem* is that the court below committed even more grievous sins against the structure of our federal system and the separation of powers—sins that this case presents an ideal vehicle to examine.

The Fifth Circuit's original decision certifying this case as a mandatory class under Rule 23(b)(1)(B) was vacated by this Court and remanded with directions to reconsider certification in light of the opinion in *Amchem*, which stressed that Rule 23's requirements "must be interpreted in keeping with ... the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.' 28 U.S.C. § 2072(b)." 117 S.Ct. at 2244 (the Act is set forth at App. 550a). The court below simply ignored this instruction: without much fuss and without any mention of the Rules Enabling Act, the panel majority reaffirmed the district court's 23(b)(1)(B) certification. App. 2a. As Judge Smith explained in dissent, "the court," contrary to the Rules Enabling Act, "now takes away state law rights of those who have been damaged in tort and allows the asbestos victims only a pro-rata share in an artificially limited settlement fund." App. 13a.

Pursuant to the Rules of Decision Act, the substantive rights of class members in this diversity action are defined by "[t]he laws of the several states." 28 U.S.C. § 1652 (App. 551a). The class complaint pleads no *in rem* claims and seeks no equitable relief. Even the court of appeals and the district court below agreed that the substantive rights at issue here are plaintiff class members' *state law*

"damages" claims for "personal injuries." App. 58a, 76a. *See also id.* at 156a & nn. 55-56 (Smith, J., dissenting). As Judge Smith explained,

> It is fundamental that an injured party has an *in personam* claim against the person responsible for his injury. Such a claim is not limited by the amount of insurance carried by a defendant, nor by its liquid assets or net worth. A final judgment against the defendant becomes much like any other debt, able to be collected from any of a defaulting debtor's existing or after acquired assets.

App. 10a. Thus, if a class member individually prosecuted her personal injury claim against Fibreboard and secured a final judgment, state law provides that the judgment would be immediately enforceable against the company *in full*, and no other class member could interfere with her collection of that judgment unless and until Fibreboard declared bankruptcy or was subjected to a receivership. When counsel for the settling parties in *Adams v. Robertson,* 117 S.Ct. 1028 (1997) (per curiam), a mandatory class action tort case that reached this Court last Term, complained that this "race to the courthouse" regime allowed the "lucky few," who got injured and were first to sue, to recover while "the vast majority" of later claimants "would be left with nothing," Justice Scalia remarked: "So what? That often happens. That most often happened under common law." Trans. of Oral Argument in No. 95-1873 at 43.

It is undisputed that the settlement imposed on this mandatory class drastically curtails the plaintiffs' substantive state law rights. In the Fifth Circuit's words, the class members' *in personam* claims against Fibreboard "will be directed to the trust for processing and payment according to the procedures provided in the trust distribution process." App. 49a. Under that settlement, compensatory damages are capped at $500,000 (even though lung cancer and other asbestos claims regularly result in verdicts in the millions); punitive damages are banned (even though they are available under the law of nearly every state); and no pre- or post-judgment interest may be awarded (even though interest is authorized by law in many jurisdictions). App. 24a (Smith, J., dissenting). Thus, as the Fifth Circuit forthrightly conceded, it is using a Rule 23(b)(1)(B) mandatory class in order "to effect a pro-rata reduction of all claims." App. 82a. By

imposing this mandatory class settlement, the courts below abridged the *substantive* rights afforded millions of class members by the tort laws of *fifty states* and substituted a "one-size-fits-all" asbestos claims regime that has not been enacted by Congress or by the legislature of any state.

This directly violates the Rules Enabling Act *and* the Rules of Decision Act. And, by utilizing a procedural rule to abridge and modify the substantive rights enjoyed by class members under their respective states' laws, the courts below have simply ignored the constitutional principles of separation of powers and federalism that undergird those statutes and that are essential to the integrity of the federal judicial system. Rule 23(b)(3) provides a mechanism for aggregating *in personam* claims if the stringent requirements of the rule are met. *See Amchem.* But because the possibility of mass opt-outs from the class would have spoiled the insurers' and Fibreboard's attempts to rid themselves of all future asbestos liability if they had sought certification under Rule 23(b)(3) (App. 43a-48a), the settling parties and the courts below have tried to shoehorn these *in personam* damages claims into a Rule 23(b)(1)(B) class. Yet as this Court recognized (in a prior case in which it was unable to reach the merits), there is "a substantial possibility" that, "in actions seeking monetary damages, classes can be certified only under Rule 23(b)(3), which permits opt-out, and not under" Rule 23(b)(1), "which do[es] not." *Ticor Title Ins. Co. v. Brown,* 511 U.S. 117, 121 (1994).

The fiction invoked by the courts below is that the plaintiffs' personal injury tort claims are in fact *in rem* claims "made by numerous persons against a fund insufficient to satisfy all claims." Advisory Committee Note to 1966 Amendment to Rule 23(b)(1)(B).[8] But there is no *res*, no fund here—limited or otherwise—and pretending there is cannot make it so:

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[8] In approving the class certification under Rule 23(b)(1)(B), the Fifth Circuit panel majority deferred to the district court's conclusory "finding" that "separate actions by members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." App. 2a. But Judge Smith is surely correct that "the enunciation of these magic words cannot insulate the underlying legal determination from review." App. 9a (Smith, J., dissenting).

> The insurance proceeds are not common or limited, but are simply all that the defendants are willing to provide to the settlement. A settlement offer is far from a "fixed asset ... in which all class members have a preexisting interest." ... [And] the plaintiffs do not have a preexisting interest in Fibreboard's assets; *the purpose of the suit is to establish those rights and not to divide preexisting rights.*

App.121a n.17 (Smith, J., dissenting)(emphasis added). When the district court conceded that the class "'claims were, *prior to settlement, in personam* in character,'" it was implying that, in its view, "the settlement transformed the claims into something other than *in personam* claims." App. 156a n.56 (Smith, J., dissenting)(quoting the district court at App. 518a) (emphasis added).

But the class members' claims are not pleaded against a bond, a ship involved in a maritime accident, a trust fund, an insurance policy, or any other specific property. Nor are the class members' claims asserted against a defendant in receivership or bankruptcy. The substantive rights of each member of this class are independent of every other's. Yet the decision below strips class members of these enforceable state law rights and replaces them with a privately negotiated and judicially endorsed "right" to seek a pro-rata share of a settlement fund limited solely by the negotiating postures of Fibreboard and its insurers. This fund is "limited" only in the most contrived and tautological sense:

> To be sure, the *settlement* does establish a limited fund: a res from which payment for all claims must be distributed. Indeed, for Fibreboard, the entire point of this settlement was to obtain a limit on liability that theretofore had been, quite literally, limitless. But that does not transform the plaintiffs' *in personam* claims against Fibreboard into in rem claims against the newly-established fund.

App. 11a (Smith, J., dissenting). Even if the mounting pressure of asbestos claims might someday have driven Fibreboard into insolvency, "the specter of eventual bankruptcy does not now render this ongoing concern a 'limited fund.'" *Id.* Until the "time of a bankruptcy discharge, tort creditors have a legally unlimited font of money from which they may demand their due." *Id.*

This settlement fund is therefore "limited" only in the sense that literally *every* settlement is limited. As Justice Souter observed during the *Amchem* oral argument, there is always "a kind of limited fund unless you assume that the defendants in these cases are simply standing in court saying, 'we'll pay anything they want—the sky is the limit.'" Tr.Oral Arg. in No. 96-270 at 14. If that phantom limitation, imposed solely by the defendant's own bargaining posture, were sufficient to justify application of Rule 23(b)(1)(B), as the court below held it is, then *every* settlement of class claims for money damages would be eligible for treatment not only under Rule 23(b)(3) but also under the more lenient and less protective Rule 23(b)(1)(B), which lacks both a predominance requirement and a guaranteed opt-out opportunity.

Outside the bankruptcy context—which is a product of legislative, not judicial, action, and which is not present here—substantive tort law does not furnish an Article III court with the power to effect such a pro-rata reduction of *in personam* claims for damages against a defendant in order to provide relief for late-arriving claimants. Federal courts, however well intentioned, cannot use a rule of civil procedure to fashion such relief in the interest of what they deem superior public policy. "Federal courts are not roving engines of justice careening about the land in search of wrongs to right." App. 153a-154a (Smith, J., dissenting).

Indeed, this settlement class is "a self-evident evasion of the exclusive legal system established by Congress for debtors to seek relief." *Keene Corp. v. Fiorelli*, 14 F.3d 726, 732 (2d Cir. 1993). In *Keene* the Second Circuit rejected an effort by an insolvent asbestos defendant to impose a mandatory class settlement upon future asbestos victims as a substitute for the substantive and procedural safeguards of bankruptcy.[9] The Second Circuit emphasized that

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[9] To be sure, the nominal arrangement of the parties in *Keene* was superficially different. But as Judge Smith pointed out, that difference reflects no more than the fact that Keene was more forthright than Fibreboard:

> Instead of retaining plaintiffs' counsel and having them file a complaint asserting claims they had no intention of pursuing (as occurred here), the asbestos manufacturer asked the court to oversee the negotiation of a settlement.

App.108a.

making pro-rata adjustments of tort creditors' rights is not a task for the federal judiciary, even if the class action procedure might be "more efficient" than bankruptcy: "the function of federal courts is not to conduct trials over whether a statutory scheme should be ignored because a more efficient mechanism can be fashioned by judges." 14 F.3d at 733.[10]

Although the Fifth Circuit grudgingly accepted the bare proposition that the Bankruptcy Code governs the distribution of the assets of a company beset by more creditor demands than it can satisfy (App. 76a), the court nevertheless undertook a review of the Code and concluded that it could do a better job. App. 74a-80a. The panel majority criticized the supposedly "weak and uncertain position afforded future tort claimants under the Bankruptcy Code" (App. 79a) and held that Congress's statutory scheme was "inferior[] to a 23(b)(1)(B) class action in the instant case." App. 74a. Citing 11 U.S.C. § 305(a)(1), the court concluded, in conflict with the Second Circuit in *Keene*, that Congress actually *intended* that "the terms and principles of the Bankruptcy Code would be circumvented" whenever a federal court and settling parties concocted their own "superior methods of asset distribution." App. 78a.

But Congress neither enacted nor intended any such delegation to Article III judges and private litigants of the quintessentially legislative power exercised by the courts below. Section 305(a)(1) merely allows a federal court to dismiss or suspend a bankruptcy proceeding "if an arrangement is being worked out by creditors and the debtor out of court." H.R.Rep. No. 595, 95th Cong., 1st Sess. 325 (1977). It is an *abstention* provision designed to promote voluntary private ordering by economic actors. It is *not* a grant of *authority*—

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[10] The *Keene* court warned that

> class members in cases such as this would have no say in the conduct of the court-appointed class representatives and unlike creditors in bankruptcy, are not able to vote on a settlement. *See* 11 U.S.C. § 1126. For them, it would be "cram-down" from start to finish. Finally, unlike a lawyer for a creditors' committee, the class representatives in matters like the present one may not be compensated unless a settlement is reached, a situation fraught with danger to the rights of plaintiffs.

14 F.3d . at 732.

and *lawmaking* authority at that—to the federal judiciary to ignore Article III and the Rules Enabling and Decisions Acts, and to circumvent the Bankruptcy Code, by using Rule 23 to enact its own solutions that prospectively alter substantive state-law rights—here, the state-law rights of unknowing, unidentified, unconsenting tort victims. That federal legislative power is reserved to Congress.

Indeed, in the Bankruptcy Reform Act of 1994 Congress enacted special legislative relief for insolvent defendants subject to present and future asbestos-related liabilities. *See* 11 U.S.C. §§ 524(g) & (h).[11] The Fifth Circuit's eagerness to usurp the role of legislative understudy notwithstanding, the actor legitimately cast in that role has already taken the stage, and there is no room for black-robed interlopers. *Cf. Mistretta v. United States*, 488 U.S. 361, 427 (1989)(Scalia, J., dissenting).

The decision below thus raises one of the fundamental problems that concerned this Court in *Amchem*, but that the resolution of *Amchem* on Rule 23 grounds made it unnecessary for the Court to reach. As Justice Kennedy put it during the argument of that case:

> If I were the district judge, I'd say, this is marvelously superior, but that is a substantive determination that you are going to displace existing law with a new, different, substantive regime, and I don't think the rules allow you to do that.

Tr. Oral Arg. 10-11. Making and imposing such substantive choices manifestly "exceeds the authority of the courts under the rule. ... [it] is the basis for legislation." Tr. Oral Arg. 22 (Kennedy, J.). *See also id.* at 23-24, 56-57. This restructuring of class members' substantive state-law rights was not merely an incidental by-product of the district court's class certification here—*it was the express purpose of this class action*. The Fifth Circuit's purposeful arrogation of legislative authority warrants the plenary attention of this Court.

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[11] These provisions allow asbestos defendants in Chapter 11 proceedings to set up a trust and enjoin even future plaintiffs from suing the defendant, thus redirecting future asbestos personal injury claims from the defendant to the trust.

III. DUE PROCESS REQUIRES THAT CLASS MEMBERS IN THIS ACTION, WHO PLEADED EXCLUSIVELY PERSONAL INJURY CLAIMS FOR MONETARY DAMAGES, BE GIVEN THE OPPORTUNITY TO EXCLUDE THEMSELVES FROM THE CLASS.

A writ of certiorari was granted by this Court in *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994) (per curiam), to decide whether due process requires that all class members be given the opportunity to exclude themselves from any class action purporting to bind them with respect to their *in personam* claims for damages. 511 U.S. at 120-21. Although the procedural posture of that case frustrated the Court's resolution of that question, the Court was unanimous that the question would warrant the Court's attention when properly raised in a future case. *See id.* at 125 (O'Connor, J., joined by the Chief Justice and Kennedy, J., dissenting) (this constitutional issue is "important enough to warrant review").

Just last Term, in *Adams v. Robertson*, 117 S.Ct. 1028 (1997) (per curiam), this Court again granted certiorari to decide "whether the certification and settlement of this class action suit (which petitioners characterize as primarily involving claims for monetary relief) violated the Due Process Clause ... because the class members were not afforded the right to opt out of the class or the settlement." *Id.* at 1029. Although the Court once again had to dismiss the writ as improvidently granted (because the issue had not been properly preserved), the Court unanimously reaffirmed its "continuing interest" in that question. *Id.* at 1032 n. 6.

No such obstacles to plenary consideration exist here: this due process question was pressed by the petitioners and expressly ruled upon below. App. 81a-85a. *See also* App. 119a-133a (Smith, J., dissenting). This would appear to be the case that the Court has been looking for. Indeed, the issue is even more ripe for resolution now because the decision below creates a conflict with the Ninth Circuit's decision in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), *cert. dismissed as improvidently granted*, 511 U.S. 117 (1994). *See* App. 120a n. 16 (Smith, J., dissenting).

The petitioners here are objectors to the class settlement who contend that the courts below erred in relying on the settlement (and on Fibreboard's then-pending insurance dispute) to recast the plaintiff class's claims for individual damages as claims for equitable

relief that qualify for mandatory class treatment. The Fifth Circuit rejected petitioners' due process objections to the mandatory nature of this class on the grounds that class members were not *really* seeking damages, but were instead seeking equitable distribution of a common fund. App. 81a-83a. Yet, as Judge Smith pointed out, *the panel majority expressly conceded that the complaint itself belies this characterization*, because the "'central remedial and legal theory of each of the named plaintiffs [is] that Fibreboard is liable in tort for damages.'" App. 156a (quoting the panel majority at App. 58a). Likewise, the district court "actually stated that '[the] claims were, prior to the settlement, *in personam* in character.'" App. 156a n. 56 (quoting the district court at App. 518a).

The Fifth Circuit's attempt to wedge its holding under the authority of other cases involving mandatory classes (App. 84a) is doomed to failure because those were bankruptcy cases where the underlying rights of the class members *were already limited* to a pro-rata distribution of a *res* created by bankruptcy proceedings *before the class actions were initiated*. *See In re Joint E. & S. Dist. Asbestos Litig. (Findley I)*, 982 F.2d 721, 735 (2d Cir. 1992) (Rule 23(b)(1)(B) mandatory class action is appropriate where parties seek equitable distribution of pre-existing bankruptcy trust fund); *In re Joint E. & S. Dist. Asbestos Litig. (Findley III)*, 78 F.3d 764, 777-78 (2d Cir. 1996) (Rule 23(b)(1)(B) may be used if case "is not an action for money damages but is rather an action in equity for the restructuring of the Trust" already established pursuant to the statutory authority of a bankruptcy court in same jurisdiction).

As shown in Part II *supra*, no such previously existing *res* or "limited fund" is at issue here. Prior to the negotiation of this settlement, Fibreboard faced "a liability that theretofore had been, quite literally, limitless." App.11a (Smith, J., dissenting). Only the district court's use of a *procedural* rule, 23(b)(1)(B), purports to have substantively transformed class members' individual *in personam* claims into an equitable, unitary, *in rem* claim against a phantom "common fund" created by the settlement of that very same class action. Before this judicial alchemy was performed, the class members possessed, and pleaded, only personal injury damages claims—precisely the kind of individual claims that occupy the zenith of what this Court has unanimously described as "our 'deep-

rooted historic tradition that everyone should have his own day in court.'" *Richards v. Jefferson County*, 116 S.Ct. 1761,1766 (1996).

To be sure, even *in personam* claims such as the class members' state law tort claims against Fibreboard can, in special circumstances, be reduced, consistent with due process and federalism, to *in rem* claims to a pro-rata share of a limited fund. But such federal alteration of *substantive* state law rights can only be accomplished pursuant to *congressional authorization*. *See Katchen v. Landy*, 382 U.S. 323, 336 (1966) ("The Bankruptcy Act, passed pursuant to the power given to Congress by Art. I, § 8 of the Constitution to establish uniform laws on the subject of bankruptcy, converts the creditor's legal claim into an equitable claim to a pro-rata share of the *res*.").

The second due process issue raised by the certification of a mandatory, nationwide diversity class action in this case is the narrower question of whether the district court in Texas "may exercise jurisdiction over the claim of [an out-of-state] class-action plaintiff," and "bind" him "concerning a claim for money damages" without affording him "an opportunity to remove himself from the class," even though "that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). That question too is properly presented here because several of the objectors are non-residents who lack minimum contacts with the forum state of Texas.[12]

As Judge Smith noted (App. 120a & n.16), on this issue the decision below is in direct conflict with the holdings of other circuits. *See In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 768-69 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989). *Cf. In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 735 (2d Cir. 1992) (upholding 23(b)(1)(B) class action seeking equitable redistribution of a pre-existing bankruptcy trust, but recognizing that "applicable standards for personal jurisdiction" under *Shutts* would forbid mandatory class treatment if members of the plaintiff class were not already beneficiaries of the trust).

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[12] Petitioners Allgood, Evers and Taylor are Alabama residents who lack even minimum contacts with Texas. Petitioners Ortiz and Cochran reside in the forum state of Texas and therefore present the broader due process question of whether all class members must be given a chance to opt out.

This case thus presents significant due process issues regarding the rights of individuals to control their own claims for damages and to choose whether to be bound by a court in a distant forum. These due process issues, which have been of continuing interest to this Court and have created a split in the circuits, provide an independent and compelling basis for this Court to grant certiorari.

IV. THIS COURT RECOGNIZED IN *AMCHEM* THAT THE NOTICE QUESTION PRESENTED HERE IS OF GRAVE IMPORTANCE.

In *Amchem* this Court stated that inherent impediments to adequate notice "rendered highly problematic any endeavor to tie to a settlement class persons with no perceptible asbestos-related disease at the time of the settlement." 117 S.Ct. at 2252. Although *Amchem* involved a Rule 23(b)(3) class, for which notice is mandated by Rule 23(c)(2), the Court relied in its notice analysis on the dissenting opinion of Judge Smith in this case, which involves a Rule 23(b)(1)(B) class, for which notice is mandated by Rule 23(e). 117 S.Ct. at 2252 (citing App. 113a-118a). The Court observed that many class members "may not even know of their exposure [to asbestos], or realize the extent of the harm they may incur." 117 S.Ct. at 2252. And, "[e]ven if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently," whether to accept or object to the settlement. *Id.* Although this Court did not "rule, definitively, on the notice given" in *Amchem*, six Justices "recognize[d] the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous." 117 S.Ct. at 2252. Because the notice problems are identical here, this question too merits the Court's plenary review.

V. THIS CLASS ACTION IS NOT A JUSTICIABLE CONTROVERSY UNDER ARTICLE III.

The decision below endorses the use of federal judicial power to enact a prospective change in the state law rights of unconsenting, unknowing, potential future asbestos tort victims who have no injuries and no ripe legal claims. It is hard to avoid the conclusion

of Judge Smith, dissenting below, that "[t]his case shatters the constitutional limits placed on the authority of the federal courts by Article III." App. 155a. "When we depart from th[e] role" of resolving actual cases and controversies by accepting proposals for "private dispute resolution mechanisms, we quickly find ourselves acting more as legislative policymakers than as judges." *Id.* at 154a. These same justiciability questions were presented in *Amchem* and occupied a considerable part of the oral argument.[13] Although the Court pretermitted them in *Amchem* by ruling that certification of the class was error in any event, the Court confirmed the importance of these questions by noting that, if certification were arguably permissible, "the jurisdictional issues would loom larger." 117 S.Ct. at 2244 n. 15.

A. This "class action" is a feigned proceeding.

Fibreboard wanted to redirect and limit the entirety of its future asbestos tort liability to its remaining insurance policies, so it solicited several cooperative plaintiffs' lawyers to arrange a global settlement. *See* page 1-3 *supra*; App. 41a. The district court judge choreographed the ensuing "proceeding." The court below found that, as an adjunct to lawsuits already pending in the federal district court in Eastern Texas between Fibreboard and its insurers over the terms of the insurance policies (App. 40a, 42a), Judge Parker directed class counsel and Fibreboard to work together on—to "negotiate"—a new lawsuit, which the district court described as "a Rule 23(b)(1)(B) settlement class composed of future plaintiffs with claims against Fibreboard." App. 45a. Those negotiations did not involve the resolution of *existing* legal claims for *actual* injuries, but the establishment of an elaborate alternative dispute resolution regime to take control of any and all *future* asbestos claims against Fibreboard.

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[13] For example, Justice Scalia suggested that there is no "case or controversy" when parties cooperatively engage a court's jurisdiction simply to embrace a settlement they've already agreed upon. Tr. Oral Arg. in *Amchem Products v. Windsor*, No. 96-270, at 25-26. Justice Kennedy suggested that such a collaborative effort to have a federal court enact an alternative dispute resolution scheme "exceeds the bounds of case or controversy." *Id.* at 24-25. And Justice Ginsburg expressed doubts about the propriety of a federal district court "creating this vast exposure-only litigation that never existed." *Id.* at 20.

Of course, those plaintiffs who had been exposed to Fibreboard's asbestos but had not yet experienced injury (the vast majority of the class) could not predicate federal jurisdiction on claims for future lung cancers or other injuries that hadn't yet occurred, because such unripe claims would lack any present injury. So the class of "exposure-only" future plaintiffs pleaded only claims for "fear of cancer," "enhanced risk of developing cancer," and "damages tied to the need to undergo medical monitoring to detect the early development of asbestos-related disease." App. 222a.

Remarkably, the district court conceded that those pleadings were a *pretext*: "This action was filed to obtain judicial approval of a class settlement which ... will resolve all *future* asbestos-related personal injury claims against Fibreboard." App. 183a (emphasis added). The Fifth Circuit likewise admitted that the parties "clearly did not intend to litigate the complaint." App. 86a. It therefore comes as no surprise that the settlement ADR process does not redress *any* of the claims pleaded in the complaint: there are no damages for "risk" of cancer, no subsidies for "medical monitoring" or psychotherapy for "fear" of cancer. App. 104a (Smith, J., dissenting). Therefore, the "*only* reason" to plead those claims in the complaint "was to manufacture jurisdiction over class members who have not yet manifested symptoms of asbestosis or otherwise suffered a legally cognizable injury." *Id.* at 104a-105a.

This is an open-and-shut case: it fails the requirements of Article III. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court." *Steel Company v. Citizens for a Better Environment*, 118 S.Ct. 1003, 1019 (1998). The filing of the complaint was orchestrated by the settling parties solely as part of their joint effort to foist their negotiated tort reform proposal upon the class. Article III jurisdiction may not rest upon such a "contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist." *City of Dawson v. Columbia Ave. Saving Fund*, 197 U.S. 178, 181 (1905).

Worse still, the district court itself participated in this charade. Just last Term, in *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055 (1997), this Court unanimously rebuked the Ninth Circuit for offering "suggestions" and "instructions" to friendly parties on how to "place" an issue before a federal court in a way that superficially appeared to be a justiciable controversy. 117 S.Ct. at 1065 & n.15.

The parties here likewise "took the steps the [federal court] prescribed" in order to sustain the pretense of a justiciable controversy. 117 S.Ct. at 1070. And the constitutional vice was the same: "In advancing cooperation between" the parties on the framing of the proceeding for submission to a federal court, the courts below "did not home in on the federal courts' lack of authority to act in friendly or feigned proceedings." 117 S.Ct. at 1070 (citing *United States v. Johnson,* 319 U.S. 302, 304 (1943)).

If anything, the abuse in this case is greater than that condemned by this Court in *Arizonans*. Here it was not just a question of rigging the appeal posture to resurrect the justiciability of a once-live legal dispute. In this case, there was no justiciable controversy at any time. This "case" is a legislative joint venture, not an adversarial lawsuit. A writ of certiorari is in order.

B. The "exposure-only" class members have no injury in fact.

To establish standing under Article III, a litigant must demonstrate that he has suffered an "injury in fact": "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). But here virtually the entire plaintiff class consists of people who have been exposed to asbestos but who have no actual injuries. They allege no disease, no physical impairment, just "risk" or "fear" of *future* injuries. App. 222a.

But allegations of "fear" and "risk" of developing an asbestos-related illness in the future are "'unadorned speculation' insufficient to invoke the federal judicial power." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). "Allegations of possible future injury do not satisfy the requirements of Art. III." *Id.* As the dissent explained in great detail below (App. 154a-180a), the vast majority of the exposure-only class members in this diversity suit cannot show "an invasion of a *legally protected interest,*" *Lujan*, 504 U.S. at 560 (emphasis added), sufficient to confer standing, because the substantive tort law of most states affords no cause of action for mere exposure to a toxin. As Justice Ginsburg pointed out during the *Amchem* argument while noting that at least 35 states recognize no such cause of action for future illness, these theoretical future

plaintiffs "do not have a claim for relief because they haven't been injured yet." Tr. Oral Arg. 57-58.

This Court has unanimously held that the question of whether the plaintiff has a "legally protected interest," and hence standing, is "'a question of substantive law, answerable by reference to'" the rule of law "'whose protection is invoked.'" *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991). Therefore, "when a state has declined to give life to a cause of action at all, federal courts sitting in diversity also must refuse to entertain that cause of action." App. 178a (Smith, J., dissenting). The question is not whether the plaintiff will win on the merits of his cause of action, but whether it is even arguable that such a cause of action even *exists* under the substantive law of the governing jurisdiction, and thus whether the plaintiff's allegations of injury, in the context of that cause of action, satisfy Article III.

A federal court has no jurisdiction if the plaintiff's "claim 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.'" *Steel Co. v. Citizens*, 118 S.Ct. at 1010. The "Article III requirement of remediable injury in fact" is not fulfilled where the plaintiff pleads only "entirely frivolous claims." *Id.* at 1013 n.2. Therefore, in the case at hand, "[a]ny claims not authorized by state law should have been explicitly excised" from the class complaint because the district court lacked jurisdiction over them under Art. III. App. 180a (Smith, J., dissenting).

Strict enforcement of the "actual injury" requirement is essential because it is "a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches." *Lewis v. Casey*, 116 S.Ct. 2174, 2179 (1996). The courts below forsook this principle, venturing instead into the legislative domain. And Article III standing requirements have a federalism dimension as well: they are "'a part of the basic charter ... providing for the interaction between the [federal] government and the governments of the several states.'" *Spencer v. Kemna*, 118 S.Ct. 978, 985 (1998) (ellipsis and brackets in original). The Fifth Circuit's legislative adventures thus invade the prerogatives of both Congress and the States and warrant the plenary attention of this Court.

CONCLUSION

As Judge Smith recognized, the outcome of this case will have a profound impact on our system of federalism and on the legal rights of tort victims throughout the nation:

> Ever since the district court's certification order, ... corporate America has been "anxiously awaiting" a decision in this case. The majority's unequivocal approval of Fibreboard's litigation strategy undoubtedly will lead "other financially threatened companies throughout the nation [to] utilize it as a road map for sheltering their assets and improperly restricting the rights of their present and future victims."

App. 101a. Although the refusal of the court below to abide by the law as announced in *Amchem* may seem unique in the degree of its insubordination, it will not remain so for long if this Court leaves the Fifth Circuit's decision unreviewed. Nor will other courts of appeals have an opportunity to rule on these questions in other cases. For by their very nature, nationwide settlement class actions can be filed anywhere in the country, and this case enshrines the Fifth Circuit as the venue of choice for mass tort defendants seeking judicially legislated tort "reforms" that abrogate state-law rights and resolve all of a defendant's future liabilities in a single stroke. Letting these issues percolate in the lower federal courts would shed no new light on this already critical problem. A writ of certiorari should issue now.

Respectfully submitted,

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In the

Supreme Court of the United States

OCTOBER TERM, 1997

ESTEBAN ORTIZ, ET AL.,
Petitioners

v.

FIBREBOARD CORPORATION, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
VOLUME I
(Pp. 1 - 242)

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APPENDIX A

In re ASBESTOS LITIGATION

JAMES FLANAGAN, David H. Middleton, Edee Cochran, Esteban Yanez Ortiz, John R. Allgood, Henry William Evers, Lester Eugene Taylor and Safety National Casualty Corporation, Appellants,

versus

GERALD AHEARN, James Mcadams Dennis, Charles W. Jeep, James Drake, Juanita Drake, James Ellison, Roland Dearborn, Judith Dearborn, Kerwin Butcher, Dir., Workers Comp., Director, Office of Workers' Compensation Programs, U.S. Dept. Of Labor, Paul Cochran, Ida Beck, Marion Behee, Longshore Intervenor, William James Mitchell, Fibreboard Corporation, Bethlehem Steel Corporation, Continental Casualty Company, Pacific Indemnity, Francis McGovern, Owens-Illinois, Inc., Penn Mutual Life Insurance Company, Columbia Casualty Company, CNA Casualty Company of California, Celotex Corp., Daniel Herman Rudd Jr., on behalf if themselves and others similarly Situated, John Hansel, on behalf of themselves and others similarly situated, Appellees.

No. 95-40635
United States Court of Appeals For The Fifth Circuit
January 27, 1998

Before Reavley, Davis and Smith, Circuit Judges.

PER CURIAM:

In our prior opinion, we affirmed the judgment below, which approved class action settlements of asbestos-related claims involving Fibreboard Corporation. *In re Asbestos Litigation,* 90

F.3d 963 (5th Cir. 1996), vacated, 138 L. Ed. 2d 1008, 117 S. Ct. 2503 (1997). The Supreme Court vacated our judgment and remanded the case for reconsideration in light of *Amchem Products, Inc. v. Windsor*, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997). After oral argument and reconsideration, we can find nothing in the *Amchem* opinion that changes our prior decision. We again affirm.

There are two controiling differences between this case and *Amchem*. First, this class action proceeded under Rule 23(b)(1); *Amchem* was a Rule 23(b)(3) case. Second, there was no allocation or difference in award, according to nature or severity of injury, in the present case as there was in *Amchem*; in the case here all members of the future claimant class are treated alike. Individual damage awards will subsequently be decided according to individual damages.

The district court made extensive findings and found, specifically, that separate actions by members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests. The language of the district court matches the language of Rule 23(b)(1)(B). No one has contested that finding of the district court, probably because it is incontestable.

The Supreme Court stated in *Amchem* that a settlement class action, like all federal class actions, cannot proceed unless the requirements of Rule 23(a) are met, irrespective of whether the proposed settlement is deemed fair under Rule 23(e). We detailed in our prior opinion our agreement with the thorough study and conclusions by the district court, satisfying the

requirements of class certification under Rule 23(a). All members of the class, and all class representatives, share the common interests: suffering harm from asbestos exposure and seeking equitable distribution of compensation from limited funds. None of the uncommon questions, abounding in *Amchem*, exist in the present case.

The only conflict between members of the future claimant class could be competition for larger and earlier shares of available money, but that is precisely the reason for Rule 23(b)(1)(B) and the problem it is designed to solve where the money is limited. That conflict or competition is controlled for the benefit of all members of the class. It follows that the lawyer representing the class serves only common interests of the class.

The judgment of the district court is AFFIRMED.

JERRY E. SMITH, CIRCUIT JUDGE, DISSENTING:

In a five-paragraph unsigned opinion, the panel majority states that "we can find nothing in the *Amchem* opinion that changes our prior decision."[1] Like that prior decision, the new majority opinion overrides the substantive and procedural rights of large groups of asbestos claimants. Because this court cannot properly bless a settlement that Congress has not authorized and the Constitution forbids, I respectfully dissent.

I.

Even if, arguendo, the law that informs this case was not plain before the Court decided *Amchem Prods. v. Windsor*, 138 L.

[1]In published form, the majority opinion will consume only about a page. Accordingly, I will not burden the reader with page references.

Ed. 2d 689, 117 S. Ct. 2231 (1997), that law is evident now. It is not surprising that the Court issued a "GVR"[2] requiring this court to reconsider the majority's now-vacated opinion[3] in light of *Amchem*. The Court issues a GVR order "where intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration . . . ." *Lawrence v. Chater*, 516 U.S. 163 at 167, 133 L. Ed. 2d 571, 116 S. Ct. 600. I believe the remand in this immensely important case merits more thorough consideration than is reflected in the majority's terse per curiam treatment.

II.

Like the district court a quo, the district court in *Amchem* had approved a gigantic settlement, including a complex scheme for processing claims administratively, in an effort to achieve efficiency and fairness in the resolution of massive numbers of asbestos claims without resort to individual trials.[4] The *Amchem* Court rejected the settlement because it plainly is not authorized by the applicable rules and statutes:

---

[2]The acronym "GVR" refers to the Supreme Court's practice of granting certiorari, vacating, and remanding for further consideration in light of some intervening development. The practice is thoroughly explained in *Lawrence v. Chater*, 516 U.S. 163, 165-75, 133 L. Ed. 2d 545, 116 S. Ct. 604 (1996) (per curiam). *See Carter v. Johnson*, 131 F.3d 452, 457 n.2 (5th Cir. 1997).

[3]See *Flanagan v. Ahearn (In re Asbestos Litig.)*, 90 F.3d 963 (5th Cir. 1996) *("Ahearn I")*, *vacated*, 138 L. Ed. 2d 1008, 117 S. Ct. 2503 (1997).

[4]For a recitation of the facts and proceedings, the reader is referred to the prior panel majority and dissenting opinions in this case. See *Ahearn I*, 90 F.3d at 968-74; id. at 993-98 (Smith, J., dissenting).

> The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution. And [Fed.R.Civ.P.] 23, which must be interpreted with fidelity to the Rules Enabling Act [, 28 U.S.C. § 2072(b),] and applied with the interests of absent class members in close view, cannot carry the large load . . . the District Court heaped upon it. As this case exemplifies, the rulemakers' prescriptions for class actions may be endangered by "those who embrace [Rule 23] too enthusiastically just as [they are by] those who approach [the rule] with distaste.

117 S. Ct. at 2252 (footnote and citation omitted, last three brackets in original).

The lesson is that, regardless of the benefits a particular settlement might seem to confer, in terms of "the greatest good for the greatest number" of parties, the niceties of statutory and constitutional constraints must be observed. Thus, while parties and district courts can be praised for their resourcefulness in formulating settlements that resolve mass tort litigation, the statutory and constitutional constraints, as the *Amchem* Court observed, "serve to inhibit appraisals of the chancellor's foot kind--class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness." *Amchem*, 117 S. Ct. at 2248.

This general theme, expressed forcefully in *Amchem*, is reinforced by the Court's discussion of specific issues, most of

which are highly relevant to the instant case. While *Amchem* focuses on the issues of predominance and adequacy of representation, the Court emphasizes that these are not the only considerations a court must address when certifying a settlement class.[5]

III.

Before discussing the issues dealt with directly in *Amchem*, I note that this is not, as the majority would have it, a limited fund case. I will show, below, that the majority's analysis is fatally flawed even if we treat this matter as involving a limited fund--a question not present in *Amchem*--but I adhere to my previously-stated view that Fibreboard and its insurers do not collectively constitute a "limited fund" that would allow class certification under Fed.R.Civ.P.. 23(b)(1)(B). See *Ahearn I*, 90 F.3d at 1002 n.17 (Smith, J., dissenting).

This issue alone should be dispositive of the matter, for if this class cannot go forward as a "limited fund" class, it would require certification under rule 23(b)(3) and would then be subject to the requirements of predominance and superiority. *Amchem* would specifically prevent class certification, for here, we have precisely the same disparities that destroyed cohesion in the *Amchem* class:

> Class members were exposed to different asbestos-containing products, for different

[5]See, e.g., *Amchem*, 117 S. Ct. at 2252 ("Because we have concluded that the class in this case cannot satisfy the requirements of common issue predominance and adequacy of representation, we need not rule, definitively, on the notice given here. . . . However . . . we recognize the gravity of the question . . . .").

> amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma . . . . Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.
>
> The [exposure-only] plaintiffs especially share little in common, either with each other or with the presently injured class members. It is unclear whether they will contract asbestos-related disease and, if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories.

Amchem, 117 S. Ct. at 2250 (quoting *Georgine v. Amchem Prods.*, 83 F.3d 610, 626 (3d Cir. 1996)). In *Amchem*, as here, differences in state law compound these disparities. Id.

The panel majority concludes that the district court's finding that Fibreboard is a "limited fund" is "incontestable".[6] This is error, for rule 23(b)(1)(B) cannot reasonably be read to allow a "limited fund" class where, as here, there is and was no "fund"

[6]The panel majority's statement that "no one has contested that finding of the district court" is simply inaccurate: Briefs in the original appeal and on remand vigorously contest the "limited fund" characterization.

except that which was established by the settlement itself.[7] Congress long ago established a comprehensive bankruptcy scheme to govern situations in which a company is unable to pay its debts. Here, the district court speculated that, at some point in the future, Fibreboard may be unable to pay all of its asbestos tort creditors. The court then, in effect, discharged the debt owed that particular class of creditors while avoiding the procedural protections of the bankruptcy code. This is manifestly incorrect.

A.

The panel majority gives great deference to the district court's factual finding that the maintenance of individual actions by class members might be dispositive of the interests of other

---

[7]Rule 23(b)(1)(B) does not mention a "limited fund" but, instead, allows class certification where individual adjudications "would as a practical matter . . . substantially impair" the ability of class members to protect their interests. Thus, the class members' interests might be in mineral reserves, water rights, or a fixed amount of money. The rule necessarily contemplates the allocation of a limited resource, however, for only where the class members' interests are to some degree mutually exclusive will the individuals' litigation "substantially impair" the others' rights. Thus, where the remedy sought is money damages, the paradigm is of a "limited fund" to be distributed for the class members' benefit.

Courts have been confronted with at least two different theories under which rule 23(b)(1)(B) would apply to cases that do not fit into this "limited fund" paradigm: the "constructive bankruptcy" and the "punitive damage overkill" theories. See Arthur R. Miller and David Crump, *Jurisdiction and Choice of Law in Multistage Class Actions after Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1, 42 (1986). The instant putative class seeks certification on the basis of "constructive bankruptcy." That is, the claimants theorize that if Fibreboard continues to pay asbestos settlements and judgments, it will eventually go bankrupt, and this, as a practical matter, will dispose of later-brought claims.

parties. The majority accurately notes that "the language of the district court matches the language of Rule 23(b)(1)(B)," but the enunciation of these magic words cannot insulate the underlying legal determination from review, any more than would a trial court's factual finding that a defendant is liable. As a matter of law, this "finding," which is overtly conclusory, is incorrect.

The class proponents cite cases in which appellate courts have upheld "limited fund" class certifications under rule 23(b)(1)(B), but these cases invariably involve a "fund" that, unlike an ongoing concern, is necessarily limited.[8] These applications of rule 23(b)(1)(B) are appropriate, for the rule obviously applies where "claims are made by numerous persons against a fund insufficient to satisfy all claims."[9] Professor Newberg states:

> A limited fund exists when *a fixed asset or piece of property exists in which all class members have a preexisting interest* . . . . Classic

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[8]For example, in *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 742-43 (2d Cir. 1992), modified on reh'g sub nom. *In re Findley*, 993 F.2d 7 (2d Cir. 1993), the underlying trust fund had been established during the asbestos defendant's bankruptcy reorganization. It was entirely proper, then, for the claims against that fund to be litigated en masse as a "limited fund" class. In *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285 (2d Cir. 1992), the defendant had established a $350 million fund in settlement of an SEC enforcement action, and subsequently went bankrupt. This, also, involved an actual "fund" that was "limited". And in *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662, 59 L. Ed. 1165, 35 S. Ct. 692 (1915), there was a true "fund" against which the individual causes of action arose: a mortuary fund held by Hartford for the benefit of thousands of members.

[9]*Rules Advisory Committee, Notes to 1966 Amendments to Rule 23*, 39 F.R.D. 69, 101; see also 1 NEWBERG ON CLASS ACTIONS § 4.09, at 4-31 (noting that "the most common use of subsection (b)(1)(B) class actions is in limited fund cases").

> illustrations include claimants to trust assets, a bank account, insurance proceeds, company assets in a liquidation sale, proceeds of a ship sale in a maritime suit, and others.

1 NEWBERG ON CLASS ACTIONS § 4.09, at 4-33 (emphasis added). Here, there is neither a fixed asset nor property in which the putative class members have an interest. Their claims are made not against a "fund", but against Fibreboard itself.

It is fundamental that an injured party has an in personam claim against the person responsible for his injury.[10] Such a claim is not ~~limited~~ by the amount of insurance carried by a defendant, nor by its liquid assets or net worth. A final judgment against the defendant becomes much like any other debt, able to be collected from any of a defaulting debtor's existing or after-acquired assets.[11]

Here, the panel majority has approved replacing the claimants' state law causes of action *in personam* with a claim against an

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[10]Take, as a random example, the admiralty case of *Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 130 L. Ed. 2d 1024, 115 S. Ct. 1043 (1994), in which the contested issue was whether the Limitation on Vessel Owners' Liability Act, 46 U.S.C. § 181 et seq., should apply. If it did, all the victims of the Chicago flood would be limited in their recovery to the value of a few marine vessels; but if it did not, the victims of the flood could recover in personam against the defendant and its insurers. See *Grubart*, 513 U.S. at 531.

[11]Also, as I note below in part III.B, Fibreboard has been purchased by Owens-Corning, whose assets could be available, in appropriate circumstances, to satisfy tort judgments. Finally, Fibreboard has announced that it is suing the tobacco industry for recovery in the nature of contribution, arguing that injuries caused by smoking aggravate injuries caused by asbestos. *See Asbestos Maker Sues Tobacco Industry*, N.Y. TIMES, Nov. 8, 1997, at D5. Any sums thus recovered will be available to pay tort judgments.

artificially-imposed "limited fund." To be sure, the *settlement* does establish a limited fund: a res from which payment for all claims must be distributed. Indeed, for Fibreboard, the entire point of this settlement was to obtain a limit on liability that theretofore had been, quite literally, limitless. But that does not transform the plaintiffs' *in personam* claims against Fibreboard into in rem claims against the newly-established fund.

It is possible that the mounting costs of defending asbestos claims and paying asbestos judgments would have driven Fibreboard to take refuge in bankruptcy court.[12] This would be unfortunate for Fibreboard's shareholders and contract creditors, but it would not be catastrophic: The Johns-Manville Corporation went through an apparently successful bankruptcy reorganization and spun off the Manville Personal Injury Settlement Trust in order to satisfy its tort liabilities. See *In re Joint E. & S. Dist. Litig.*, 982 F.2d at 725. And in any case, the specter of eventual bankruptcy does not now render this ongoing concern a "limited fund." Up until the time of a bankruptcy discharge, tort creditors have a legally unlimited font of money from which they may demand their due.

This proposed settlement class is in fact "a self-evident evasion of the exclusive legal system established by Congress for debtors to seek relief."[13] But here, the "constructive

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[12]I note the indeterminacy inherent in this speculation: At what point does a "fund" become "limited"? A district court must assess the probability and likely amount of the claimants' recovery, and balance this against its estimation of the defendant's future ability to pay.

[13]See *In re Keene Corp.*, 14 F.3d 726, 732 (2d Cir. 1993), in which the court noted:

(continued...)

bankruptcy" is reached without the protections of the Bankruptcy Code: procedural protections--such as the creditors' vote on settlements--and substantive protections--such as tort creditors' preferred status. It is, moreover, a colossal bailout for Fibreboard's shareholders that would not occur in bankruptcy. Instead of approving this evasion of the mechanisms established by the legislative branch, we should be mindful that "the function of federal courts is not to conduct trials over whether a statutory scheme should be ignored because a more efficient mechanism can be fashioned by judges." *In re Keene*, 14 F.3d 726 at 733.[14]

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[13](...continued)

Indeed, the process contemplated by [class proponents] mirrors a bankruptcy proceeding. The finding of a limited fund corresponds to a finding of insolvency. The preliminary injunction serves much the same function as the automatic stay under Section 362(a) of the Bankruptcy Code. 11 U.S.C. § 362(a) (1988). The class representatives correspond to creditors' committees in Chapter 11 proceedings. See 11 U.S.C. § 1102 (1988). The proposed mandatory class settlement mirrors a reorganization plan and "cram-down," see 11 U.S.C. § 1123, 1129(b), followed by a discharge, 11 U.S.C. § 1141(d).

Id at 732 (citation omitted).

[14] Commentators have questioned the propriety of using rule 23(b)(1)(B) as a means of avoiding bankruptcy proceedings. See, e.g., 3 NEWBERG ON CLASS ACTIONS § 17.15A, at 3S-16 (3d ed. Supp. 1994) (opining that "a 23(b)(1)(B) class should not serve as a substitute for bankruptcy proceedings"); see also, e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of Mass Tort Class Actions*, 95 COLUM. L. REV. 1343, 1382-83, 1458-59 (1995); Richard Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858, 880-81 (1995); William Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837, 840 (1995).

The panel majority thus supplants the bankruptcy law with a judge-made system to extinguish the rights of tort creditors. And the panel ignores the obvious application of rule 23(b)(1)(B), which does not allow a defendant to limit its substantive liability through the creation of a limited fund--as was done here--but rather is a mechanism for the equitable distribution of a pre-existing fund.

But perhaps most striking is the panel's apparent disregard for principles of federalism and the limits of the Rules Enabling Act. Contrary to the Congressional mandate that the rules of civil procedure not "abridge, enlarge, or modify any substantive right," 28 U.S.C. § 2072, this court now takes away state law rights of those who have been damaged in tort and allows the asbestos victims only a pro-rata share in an artificially-limited settlement fund. As a matter of law, this class cannot be certified under rule 23(b)(1)(B).

B.

Even assuming, arguendo, that rule 23(b)(1)(B) allows certification of a "limited fund" class of in personam claimants against a solvent, ongoing concern and its solvent insurers, the panel majority erred in accepting the district court's factual decision that this is a limited fund. Fibreboard was recently acquired by Owens-Corning in a tender offer for about $515 million cash, plus $85 million of assumed debt. See Andrea Puchalsky, *Owens-Corning to Buy Fibreboard for $515 million*, WALL ST. J., May 29, 1997 at A4. This stands in contrast to the district court's finding, upheld by this court, that Fibreboard was worth no more than $235 million.

This discrepancy could indicate clear error, but at the very least it calls for a remand for new fact finding as to value of

Fibreboard as a potentially "limited fund." By issuing its new opinion, the majority declines, by implication, to permit the district court to reconsider that finding.

IV.

Although the Supreme Court's remand was specifically for reconsideration in light of *Amchem*, the instant matter has the procedural posture of an appeal from the entirety of the district court's judgment. In other words, the remand does not limit the scope of our review. Accordingly, I reiterate, briefly, some of the other points discussed in the original panel opinion and dissent, simply to indicate that these are still live issues important to our consideration.

For example, even if it were properly certified under rule 23(b)(1)(B), this class cannot proceed as a mandatory class in contravention of *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 86 L. Ed. 2d 628, 105 S. Ct. 2965 (1985). See *Ahearn I*, 90 F.3d at 1001-06 (Smith, J., dissenting). Moreover, this class--which by definition includes persons unaware of any injury or even exposure[15]--could never meet rule 23's requirement of notice to class members. See *Ahearn I*, 90 F.3d at 999-1000 (Smith, J., dissenting); see also *Amchem*, 117 S. Ct. at 2252 (citing the *Ahearn I* dissent with approval). Perhaps most importantly, this class--with legions of members who lack legally cognizable claims, and many members who have not even suffered injury-in-fact--cannot meet the irreducible minimum

[15] Indeed, the class includes "persons"--the future children of persons exposed to asbestos--who had not yet been conceived at the time the complaint was filed.

standards of justiciability under U.S. CONST. Art. III.[16] See *Ahearn I*, 90 F.3d at 1015-26 (Smith, J., dissenting); see also *Amchem*, 117 S. Ct. at 2244 (declining to reach jurisdictional issues before deciding "logically antecedent" rule 23 certification issues).

V.

Even if these reasons were invalid, this class must fail under *Amchem* because of the lack of common issues and the inadequately-representative named plaintiffs. The Amchem settlement class, similarly, failed to meet the "adequacy of representation" requirement of rule 23(a). *Amchem*, 117 S. Ct. at 2252. The Court stated:

> Nor can the class . . . satisfy Rule 23(a)(4)'s requirement that the named parties will fairly and adequately protect the interests of the class. The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. [A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members.
>
> . . . In significant respects, the interests of those within the single [*Amchem*] class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-

[16] Again, I call attention to the "future children" and "future spouses" categories of claimants. See *Ahearn I*, 90 F.3d at 1018-19 (Smith, J., dissenting).

> only plaintiffs in ensuring an ample, inflation-protected fund for the future.

117 S. Ct. at 2250-51 (citations and internal quotation marks omitted).

A.

The *Amchem* Court firmly established three principles of law with respect to rule 23(a)(4). Perhaps most importantly, adequacy of representation must be analyzed as a procedural safeguard--a "structural assurance" that the class members' interests are protected, irrespective of the fairness of the outcome.[17] Id. at 2251. And it is the class representatives who matter: the named plaintiffs, not their lawyers. Furthermore, the Court's treatment of the issue makes plain that the adequacy of representation--or its converse, the existence of conflicts--is treated as a question of law, not as a factual matter to be proven by expert testimony.

1.

The *Amchem* Court was presented with a factual "no conflict" finding similar to the district court's finding in this case. The

[17] Of great importance here is a point recognized by the panel majority, that a settlement class "cannot proceed unless the requirements of Rule 23(a) are met, irrespective of whether the proposed settlement is deemed fair under Rule 23(e)." See also *Amchem*, 117 S. Ct. at 2248 (holding that the fairness inquiry is "an additional requirement, not a superseding direction" to the requirements of Rules 23(a) and (b)). This directly contradicts *Adams Extract Co. v. Pleasure Hours, Inc. (In re Corrugated Container Antitrust Litig.)*, 643 F.2d 195 (5th Cir. Apr. 1981). See, e.g., *id.* at 212 ("If the [settlement] terms themselves are fair, reasonable and adequate, the district court may fairly assume that they were negotiated by competent and adequate counsel").

same legal ethics expert who testified in *Ahearn* testified in *Amchem* that he perceived no intraclass conflict, or that if there was a small conflict it was overwhelmed by the commonalities. See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 297-98 (E.D. Pa. 1994). The district court agreed. Id. In their briefs, the class proponents vigorously argued the factual "no conflict" determination to the Supreme Court. See, e.g., *Amchem* Brief for Petitioner at 45-49, 1996 WL 721641, at *45-49.

But the Supreme Court disregarded the expert's testimony and the *Amchem* district court's extensive findings of fact on the issue of representativeness. Cf. *Amchem*, 117 S. Ct. at 2250-52. Instead, from its own review of the various and potentially adverse interests among class members, the Court determined that conflicts existed--without regard to the conclusions of expert witnesses or of the district court. It is thus apparent from *Amchem* that the existence of conflicts is very much a question of law, not fact.[18] As did the *Amchem* district court, however, the district court and panel majority here incorrectly have treated the conflict inquiry as a factual one. In *Ahearn I*, the majority stated that "just what measure of representation is adequate is a question of fact that depends on each peculiar set of circumstances." 90 F.3d at 977 (quoting *North Am. Acceptance Corp. v. Arnall, Gordon & Gregory*, 593 F.2d 642, 644 n.4. (5th Cir. 1979)). The new majority opinion apparently draws on that conclusion when it says that "we detailed in our prior opinion our agreement with the thorough study and conclusions by the district court, satisfying the requirements of class certification under Rule 23(a)." Now, in light of *Amchem*,

[18] Of course, the underlying circumstances--for example that certain types of claimants are differently situated in the settlement value of their underlying claims--would be a factual matter.

we know this conclusion was incorrect: Adequacy is determined as a matter of law.

2.

The *Amchem* Court also emphasized the crucial distinction between the adequacy of the class representatives themselves, on the one hand, and the adequacy of class counsel, on the other hand. Thus, the *Amchem* Court, rather than looking at the plaintiffs' lawyers' competence or ethical conflicts of interest, questioned whether the named plaintiffs shared the same interests as did the class they purported to represent.[19] The Court stated that the rule 23(a)(4) adequacy inquiry requires that "the named parties will fairly and adequately protect the interests of the class." *Amchem,* 117 S. Ct. at 2250 (emphasis added, internal quotations omitted). Not just the attorneys, but also the named parties must be without conflict with the class they seek to represent. Id. This is especially true where, as here, claimants are deprived of the right to opt out. See *Ahearn I,* 90 F.3d at 1009 (Smith, J., dissenting).

3.

Throughout *Amchem*, the Court reminds us that the rule 23 class composition requirements are structural protections: prophylactic rules that must be applied even where a seemingly desirable result has been achieved without their help. Noting

[19] Rule 23(a)(4) requires that the both the named plaintiffs and the class counsel be adequately representative. The Court made this distinction explicit, noting, "we decline to address the adequacy-of-counsel issues in light of our conclusion that common questions of law or fact do not predominate and that the named plaintiffs cannot adequately represent the interests of this enormous class." *Amchem*, 117 S. Ct. at 2251 n.20.

Congress's direction that the rules of procedure "shall not abridge any substantive right," 28 U.S.C. § 2072(b), the Court states that rule 23's "dominant concern" is whether "absent class members can fairly be bound by decisions of class representatives." *Amchem,* 117 S. Ct. at 2248. The adequacy inquiry is ultimately designed to protect the members' due process rights, to keep them from being bound in absentia by someone who does not adequately protect their interests. See id.; see also *Hansberry v. Lee,* 311 U.S. 32, 85 L. Ed. 22, 61 S. Ct. 115 (1940). In other words, the class certification inquiry does not examine the merits of the tradeoffs created by a settlement, but examines whether class representatives and class counsel had the authority to trade at all.

Amchem thus specifically rejects any attempt to circumvent the structural safeguards of rule 23(a) by looking only to the substantive fairness of the outcome under rule 23(e).[20] The rules "designed to protect absentees by blocking unwarranted or overbroad class definitions [] demand undiluted, even heightened attention in the settlement context." *Amchem,* 117 S. Ct. at 2248. Ignoring the class proponents' protestations that the settlement was fair, and that the class members' interest in achieving a fair settlement established a unifying interest among all the members, see *Amchem* Brief for Petitioner at 43-48, 1996 WL 721641, at *43-48, the *Amchem* Court unequivocally reiterated that structure must prevail over content.

It is not enough that a named plaintiff in fact works for the overall good of the class. A representative must "possess the

[20] As one academic noted, "Due process must mean something other than that the result is just, otherwise some lynchings would be consistent with due process." Susan Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1123 (1995).

same interest and suffer the same injury as the class members" and must be aligned in interest such that no conflicts exist between the representative and any "discrete subclasses" within the broader class he purports to represent. *Amchem*, 117 S. Ct. at 2251. *Amchem* demands a *"structural assurance* of fair and adequate representation for the diverse groups and individuals affected." Id. (emphasis added).

A corollary of rule 23(a)(4)'s mandate of unconflicted representation as a "structural assurance" is that any real conflict, even if minor when compared to interests held in common, will render the representation inadequate. Thus, *Amchem* did not weigh the myriad common interests within that class against the conflicts, in order to decide whether the conflicts were "*de minimis*" or were somehow overcome by the commonalities.

Rather, the analysis was explicitly focused on the mere existence of some intraclass conflict.[21] Cf. *Amchem*, 117 S. Ct. at 2250-51. And the Court specifically stated that the class conflicts were not "made insignificant" by the ample funding provided by the settlement. Id. at 2251. In accordance with *Amchem*, therefore, we should not care--because the Supreme Court did not--whether having maximum dollars in a settlement fund is in everyone's interest, or even whether that unifying interest seems to outweigh the singular and disunifying interests among the various de facto subclasses.

Amchem requires that the class representatives possess an identity of interest with the class they represent, and also that

[21]The only intraclass conflict identified as such by the Court was the conflict between the currently injured and exposure-only plaintiffs. See *Amchem*, 117 S. Ct. at 2251. The same conflict, of course, exists here.

"the named plaintiffs operated under a proper understanding of their representational responsibilities." Id. Where discrete subclasses exist, each "separate constituency" must be represented as such:

> The class representatives may well have thought that the Settlement serves the aggregate interests of the entire class. But the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups.

Amchem, 117 S. Ct. at 2251 (quoting *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d at 742-43).

Therefore, in order for this class properly to be certified, exposure-only and pre-1959 representatives must have been representing the interests of their own subgroup, not the amorphous interest of the class as a whole. But there was no structural mechanism here to ensure that each discrete interest (such as the exposure-only claimants' interest in a lower damage cap) was given an advocate in the settlement negotiations. Rather, if these discrete interests were voiced at all, it would have been by someone perfectly willing--indeed, obligated by his duty to the class as a whole--to subordinate that discrete interest to his conception of the broader interests of the class.[22]

[22]As discussed below, the terms of the settlement demonstrate why interested and express advocacy was necessary: It appears that the most cohesive and self-identified group--the presently injured--may perhaps unconsciously have advanced its own interests at the expense of the more diffuse and unidentified

(continued...)

B.

Two important conflicts exist between certain class members and their representatives.[23] The same conflict between present and future claimants identified in the *Amchem* class also is present here: "Most saliently, for the currently injured, the critical goal is generous immediate payments. This goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future." *Amchem*, 117 S. Ct. at 2251. Because of that conflict alone, this cannot go forward as a single class.

Furthermore, this class contains the additional conflict between the pre- and post-1959 claimants. These groups are treated alike under the settlement, even though their claims are worth vastly different amounts in the tort system.[24] These structural conflicts effectively create discrete subgroups within

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[22](...continued)
future claimants.

[23]These two structural conflicts are not the only ones, however. For example, the direct claimants--who allegedly suffered injury from direct exposure to asbestos, and would recover under any tort regime--are in opposition to the indirect claimants--who only suffered injuries such as loss of consortium, and whose claims might not be cognizable in some states. See 41 AM. JUR. 2D Husband and Wife § 247 (stating that jurisdictions may treat loss of consortium claims as derivative of the underlying personal injury, and thus a judgment in one establishes res judicata as to the other, or they may treat the loss of consortium claim as a distinct action). Obviously, negotiating the settlement's treatment of indirect claimants will pit these two groups against each other.

[24]Before the settlement became imminent, the pre-1959 claims settled for an average of $12,000, while the post-1959 settled for only $4,000. Once the asbestos world expected that the settlement would go through, the pre-1959 claims settled for only $8,000, while the value of the post-1959 claims had risen to $7,000. MEALEY'S LITIG. REP. June 2, 1995, at 20.

the *Ahearn* class. Even if these conflicts are small in comparison to other arguable common interests, certification of the conflicted class was improper without proper subclassification and representation.[25] Because the panel majority states that "there was no allocation or difference in the award, according to the nature or severity of injury," one is led to infer that the only interest that was ever in play here was the unitary interest of all the class members in receiving money. That inference is incorrect.

The settlement has two essential parts: a common fund and a mandatory process for distributing that fund. Even if all claimants are treated alike under the settlement--without regard to their status--this still reflects an allocation decision, with the various groups pitted against each other to receive parts of the fund.

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[25]I note, however, that the putative class's common interests are *not* overwhelming. The panel majority describes those interests as "suffering harm from asbestos exposure and seeking equitable distribution of compensation from limited funds." This is in accord with the original majority opinion, which essentially found the common interest to be maximizing and efficiently distributing the settlement. *Ahearn I*, 90 F.3d at 981.

Amchem refutes the proposition that the class members' common interest in achieving or maximizing a settlement could align their interests sufficiently enough to satisfy rule 23(a)(4). The district court that originally certified the *Amchem* class relied on this rationale: "So long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not antagonistic for representation purposes." *Georgine v. Amchem Prods.*, 157 F.R.D. 246, 317 (E.D. Pa. 1994). But the Supreme Court squarely rejected this rationale. The fact that everyone had an interest in receiving money does not suffice to ensure that the named parties would "fairly and adequately protect the interests of the class." See *Amchem*, 117 S. Ct. at 2250-51. The putative class members' lack of common interests is dealt with at length in Part V, below.

In order to negotiate the settlement fund and establish the distribution process, the parties engaged in a series of compromises, attempting to balance the interests of the various subgroups in order to arrive at a settlement to the benefit of all. Thus, individual claims are capped at $500,000, regardless of the nature of the claim or when it manifests itself.[26] There is an outright ban on punitive damages. Pre- and post-judgment interest is eliminated, despite its availability in many jurisdictions and its obviously disproportionate impact on latent claimants. Claims arising under highly different legal systems--such as maritime versus non-maritime law, and common law versus civil code--are treated identically.

But perhaps the most salient allocation was the decision to treat the pre- and post-1959 claimants alike. It is true that the class as a whole benefited from this, and perhaps from each of the other compromises.[27] It is also true that the settlement treats everyone the same. But in so doing, it ignores the pre-settlement status--and rights--of the widely disparate groups of claimants.[28]

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[26]By contrast, mesothelioma claims had averaged tort recoveries in the millions. Also, consider how this cap reflects an allocation between latent claimants--who desire a low cap, in order to preserve the fund for when their injuries become manifest--and patent claimants--who would prefer high present damages.

[27]It is axiomatic that the class as a whole was giving something up in return for the guaranteed settlement. Fibreboard and its insurers must have thought they were getting a good deal--that the settlement cost was less than their actual liability--or they would not have entered into the agreement. The question, though, is whether some claimants' rights were traded away, and whether those claimants were adequately represented.

[28] This might be likened to an airline that eliminates both coach and first class seating, creating a new "business class" for everyone, and then applies (continued...)

The settlement forced the pre-1959 claimants to give up something of value that is legally their due--their cause of action against an insured Fibreboard--in order to benefit a group of claimants to whom they owe nothing. To deprive them of that right requires that the absent class members have been protected by rule 23(a)(4)'s structural safeguard of due process through representation.

It is immaterial that, arguably, the settlement might not have been different had it been negotiated with representatives of the subclasses. Likewise irrelevant is whether the settlement was fair and in everyone's best interest. The gravamen of prophylactic rules is that they must be followed even where they seem burdensome and inconsequential.

C.

The panel majority apparently believes the adequacy inquiry in this case to be distinguishable from that in *Amchem*, for this is a rule 23(b)(1)(B) action, while *Amchem* was not. That distinction is relevant, but it cuts against certification. Here, in a limited fund action, it is even more true that the class members

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[28](...continued)
this new arrangement to a flight on which many of the seats have been sold. Those who bought a coach ticket are thrilled to receive a better level of service, but those who paid for first class have been deprived of their due. Even if the group as a whole is better off--for the many coach passengers' happiness outweighs the few first class passengers' disappointment--this would be unacceptable.

In economic terms, this result would be Kaldor-Hicks optimal. But here, in order not to divest vested rights, any acceptable result must come closer to Pareto optimality.

were pitted against one another, and that their interests needed to be aligned with those of their loyal representatives.

In *Amchem*, the Court stated that "although this is not a 'limited fund' case certified under Rule 23(b)(1)(B), the terms of the settlement reflect essential allocation decisions designed to confine compensation and to limit defendants' liability." 117 S. Ct. at 2251. Thus, even though the *Amchem* defendants had a theoretically unlimited supply of dollars with which to pay future claimants--so that the allocation of dollars was not a zero-sum game, and class members' potentially conflicting interests were thus arguably not pitted against one another--still, that settlement made "essential allocation decisions" by which some class members won and some lost. Thus, the Court worried that the settlement had chosen winners and losers "with no structural assurance of fair and adequate representation for the diverse groups and individuals affected." Id.

Here, there is no question that the settlement makes "essential allocation decisions." This is, after all, a "limited fund" class, in the view of the panel majority. If that is so, there is only one apple, and anyone who might ever assert a claim against the defendants is fighting for a bite of it. The need for adequate representation is even more important where, as here, one person or group loses for every time another person or group wins.

The settlement's terms reveal its inter-group allocative effect. The high cap on damages hurts latent claimants (who would prefer a lower cap to ensure that there is some money left when their injuries finally become manifest), while patent claimants benefit. The ban on punitive damages hurts claimants from jurisdictions where such awards are generally available, saving a larger slice of the apple for those for whom punitives would

not be available. Perhaps most egregiously, the settlement eliminates the privileged status of the pre-1959 claimants (who were covered by Fibreboard's insurance policy) and places them on equal footing with the post-1959 claimants (whose claims were largely uninsured). This settlement undeniably picks winners and losers.

A limited fund only increases the potential of intraclass conflicts. If the settlement in *Amchem* was legally flawed, this one is even more so. Where, as here, there are significant and potentially adverse subgroups within a class, their interests must be protected by representation as such.

Although recognizing that the class representatives might have thought the settlement in the best interests of the class as a whole, the Court in Amchem demanded a "structural assurance of fair and adequate representation for the diverse groups and individuals affected." Id. at 2251. This case demands no less.

V.

The *Amchem* class was rejected also, in part, because common questions of law or fact did not predominate over questions affecting only individual class members. See id. at 2249 (citing rule 23(b)(3)). That analysis does not directly control the instant supposed "limited fund" class, for rule 23(b)(1)(B) imposes no such predominance requirement, but calls only for rule 23(a)(2) commonality. And, noting that for rule 23(b)(3) classes the test of commonality is subsumed under or superseded by the more stringent predominance inquiry, the Court declined to address commonality as such. Id. at 2243.

Here, where common issues need only exist, not predominate, *Amchem's* ultimate conclusion has no bearing on the type and

relative significance of the issues necessary to pass muster under rule 23(a)(2). The *Amchem* analysis is still pertinent, however, for *Amchem* speaks directly to the relevance of the settlement to either inquiry. *Amchem* tells us what sort of common issues may be considered: whether they must preexist the settlement, or whether an interest in the settlement itself may provide the common issues in satisfaction of rule 23(a)(2) or rule 23(b)(3).

Amchem tells us that, although a settlement is "a factor in the calculus," 117 S. Ct. at 2249,[29] the parties' interest in the settlement will not suffice to establish a "common interest" among the class members. "The benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme . . . is not pertinent to the predominance inquiry. That inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement." Id. (emphasis added). "If a common interest in a fair compromise could satisfy the predominance requirement . . ., that vital prescription would be stripped of any meaning in the settlement context." Id. at 2249-50.

The class proponents would object that by its terms, this rule speaks only of "predominance," not "commonality." Here, though, that is a distinction without a difference. That the predominance inquiry imposes a higher standard--by requiring

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[29]The Court found the fact of and terms of a settlement relevant in only three contexts: (1) The terms of the settlement may indicate whether the absentees' interests are adequately represented. 117 S. Ct. at 2248. (2) The fact of a settlement also eliminates the need for a rule 23(b)(3)(D) manageability inquiry. Id. And (3) when a class is a settlement-only class, it requires that heightened attention be given to the class definition, as there will be no way to refine and adjust the class as litigation unfolds. Id.

not only that the common issues exist but that they outweigh the uncommon issues--is irrelevant, for the Court made explicit that the issues themselves--whether they must be "predominant" or simply "common"--must arise from interests that preexist the settlement.

That there is a settlement, or that it is fair, does not eliminate or modify the other requirements of rule 23. Id. at 2248. The plain text of rule 23 requires the putative class to meet its requirements by reference to the intrinsic features of the class members' claims, not to the settlement. *Amchem* reminds us that courts "lack authority to substitute for rule 23's certification criteria a standard never adopted--that if a settlement is 'fair,' then certification is proper." Id. at 2249. A court must apply the "criteria the rulemakers set." Id.

A settlement cannot itself be used to establish commonality, because to do so would cripple the settlement process from its inception; a putative class unable to meet the requirement of rule 23(a)(2) without the "commonality" established by a settlement could never be certified for litigation. And if settlement were allowed despite the impossibility of litigation, class counsel "could not use the threat of litigation to press for a better offer," and the resulting settlement would be a one-sided deal that sells out the plaintiff class for a pittance and works only in the true interest of the defendant and its insurers and the attorneys for both sides. See id. at 2248-49. For policy reasons as well as adherence to the text of the rule, then, *Amchem* mandates that every class meet the rule 23 certification requirements independently of any common interest they might share in obtaining or maximizing the proposed settlement.

In its original opinion, the panel majority relied exclusively on the common interest of the class members in the settlement,

citing *Adams Extract Co. v. Pleasure Hours, Inc. (In re Corrugated Container Antitrust Litig.)*, 643 F.2d 195, 211 (5th Cir. Apr. 1981),[30] for the proposition that "the terms of the settlement were vitally important to the determination that certification was appropriate." *Ahearn I*, 90 F.3d at 975. The majority went on to cite other authority for the proposition that "in the settlement class context, common issues arise from the settlement itself," id., and then applied its view of the law to the putative *Ahearn* class:

> The district court, in its findings of fact, found that the entire Global Health Claimant Class had the following issues in common:
>
> (i) avoiding the potentially disastrous results of a loss by Fibreboard in the Coverage Case appeal; (ii) maximizing the total settlement contribution from Fibreboard and the Insurers; (iii) streamlining the procedures for the filing, processing and resolution of claims, and thereby reducing transactions costs and delays in compensation; (iv) minimizing the percentage of their compensation diverted from them to pay attorneys' fees; and (v) adopting procedures that provide for payments to claimants in an equitable manner.

[30]I reiterate that *Corrugated Container's* reliance on the fairness of, and interest in, the settlement is invalidated by *Amchem*. Also in doubt is the viability of *Meat Price Investigators Ass'n v. Iowa Beef Processors (In re Beef Indus. Antitrust Litig.)*, 607 F.2d 167 (5th Cir. 1979), in which this court stated: "As the law now stands, tentative or temporary settlement classes are favored when there is little or no likelihood of abuse, and the settlement is fair and reasonable and under the scrutiny of the trial judge." Id. at 174.

> The intervenors do not disagree that the settlement class holds these issues in common. Instead, they argue that these issues do not support a finding of commonality because they are derived from the settlement rather than from the *Ahearn* complaint. As we noted above, this argument has no merit and is foreclosed by our holding in Container I. Because the evidence is overwhelming that the class holds the above issues in common under the settlement (even the intervenors concede this point), we agree with the district court that the *Ahearn* action and the Global Settlement Agreement presented it with questions of law and fact common to the entire Global Health Claimant Class.

Id. at 975-76. This passage makes apparent that the panel majority based its finding of commonality solely on the now-discredited theory that the class members' interest in the settlement itself is sufficient to fulfill rule 23's commonality requirement.[31]

In its latest opinion, the majority addresses this point in one sentence: "All members of the class, and all class

[31]The common issues described by the district court and the first panel opinion are remarkably similar to one of the common issues relied on by the *Amchem* district court and squarely rejected by the Supreme Court: "their common 'interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system.'" *Amchem*, 117 S. Ct. at 2249 (quoting *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. at 316). This benefit, the Court held, "is a matter fit for legislative consideration, but *it is not pertinent* to the predominance inquiry." Id. (emphasis added).

representatives, share the common interests: suffering from asbestos exposure and seeking equitable distribution of compensation from limited funds." As I have said, the latter "interest" in the settlement fund, because it does not preexist the settlement, cannot establish commonality. And the putative interest in "suffering from asbestos exposure" is simply inadequate.

To begin with, it is factually incorrect to say that all the class members have "suffered from asbestos exposure."[32] The futures claimants, of course, have, by definition, "suffered" nothing, although presumably they have been exposed. Likewise, the future children and future spouses of persons exposed to asbestos have suffered nothing and have been exposed to nothing.

Presumably the majority means that by the time their claims ripen and become justiciable, every class member will have a common interest in that he will deserve some compensation from Fibreboard that in some way stems from Fibreboard's manufacture of asbestos. At such an extreme level of generality, the members of this class conceivably could possess some level of commonality. But this is not a justiciable common interest sufficient to maintain the class. Consider a commercial airline that suffers several disasters: one in Oregon, one in Louisiana, and one off the coast of Brazil. The owners of property that is damaged when the plane crashed into it, the bystanders injured by flying debris, and the deceased passengers' and crewmembers'

[32]This "interest" is like the "interest" the majority identified in its prior opinion: that, in addition to the now discredited "interest in the settlement" theory, commonality exists because "Fibreboard is liable in tort for damages incurred due to exposure to Fibreboard asbestos." See *Ahearn I*, 90 F.3d at 975-76.

next of kin all have "suffered from" the crashes.[33] But no federal court would allow these disparate groups, under dissimilar legal systems, asserting divergent legal claims, all to join together under the aegis of their common "suffering from the airplane crashes."

In such a case, then, the superficial commonality of having suffered some injury will not suffice. Instead, the common issue must be necessary to the theory of recovery: "The individual's *claim* and the class *claims* [must] share common questions of law or fact." *General Tel. Co. v. Falcon*, 457 U.S. 147, 157, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982) (emphasis added). And it must be significant:

> The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.

Id. at 157 n.13. It is not enough for some general sort of commonality to exist. The commonality must be justiciable: It must derive from a substantial legal or factual question that is necessary to the class members' theories of recovery.

[33]The reader may add facts as needed to sustain the analogy. For example, the claims against the airline add up to a lot of money, so by the panel majority's reasoning, one might consider the airline and its insurers a "limited fund."

It might be that the members of the putative *Ahearn* class do have issues in common, issues preexisting and apart from the settlement. It might also be that these issues would suffice to establish rule 23(a) commonality. The district court and the panel majority did not cite any such common issues, however.

In fact, the gist of this class is that the driving commonality was the class members' interest in the settlement itself: that in order to keep the defendants from going bankrupt and to forestall a possibly disadvantageous result in the insurance litigation, the plaintiff class members found it in their common interest to settle. *Amchem* tells us this is not enough.

VI.

In sum, this class cannot go forward. It cannot be certified as a "limited fund" class under rule 23(b)(1)(B), because it does not concern such a "limited fund," but rather is an aggregation of claims against a solvent, ongoing concern and its insurers.

But even if this class did involve a "limited fund" under rule 23(b)(1)(B), *Amchem* makes plain that it must still fail the requirements of rule 23(a). The pre- and post-1959 claimants and the patent and latent claimants are discrete and often adversarial subgroups. That the class structure fails to recognize these groups as such and to afford them proper representation causes the class to fail the adequacy requirement of rule 23(a). Further, because *Amchem* will not allow commonality to stem from a putative interest in the settlement itself, this class must also fail for want of common issues.

The panel majority embraces a settlement that it considers a triumph of practicality. In doing so, it casually dismisses the

teaching of *Amchem* and blesses a class that falls far short of legal and constitutional requirements. I do not believe the Supreme Court spoke cryptically in vacating our earlier opinion while articulating, in *Amchem*, the specific standards for us to apply on remand. Because the majority adheres to an opinion that is foreclosed by the Court's reasoning, I respectfully dissent.

APPENDIX B

ESTEBAN ORTIZ, et al.,
versus
FIBREBOARD CORPORATION, et al.,

No. 96-1394
Supreme Court of the United States
June 27, 1997

Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Amchem Products, Inc. v. Windsor*, 117 S.Ct. 2231 (1997).

APPENDIX C

In re ASBESTOS LITIGATION

James FLANAGAN; David H. Middleton; Kenneth Smith; Edee Cochran; Esteban Yanez Ortiz; John R. Allgood; Henry William Evers; Lester Eugene Taylor; Plant Insulation Company; Safety National Casualty Corporation, Appellants,

versus

Gerald AHEARN; James McAdams Dennis; Charles W. Jeep; James Drake; James Ellison; Roland Dearborn; Judith Dearborn; Kerwin Butcher; Dir., Workers Comp., Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor; Longshore Intervenor; William James Mitchell; Fibreboard Corporation; Bethlehem Steel Corporation; Continental Casualty Company; Pacific Indemnity; Francis McGovern; Owens-Illinois, Inc.; Penn Mutual Life Insurance Company; Columbia Casualty Company; CNA Casualty Company of California; Celotex Corp., Daniel Herman Rudd, Jr., on behalf of themselves and others similarly situated; Beverly White, on behalf of themselves and others similarly situated; John Hansel, on behalf of themselves and others similarly situated; Appellees.

Nos. 95-40635, 95-40694.
United States Court of Appeals,
Fifth Circuit.
July 26, 1996.

Appeals from the United States District Court for the Eastern District of Texas.

Before REAVLEY, DAVIS and SMITH, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

In this consolidated appeal, we consider a number of challenges to the district court's approval of a class settlement of future asbestos victims with Fibreboard along with several related settlements. For the reasons that follow, we affirm the district court's judgment.

I. BACKGROUND

A. Procedural and Factual History

Fibreboard, primarily engaged in the timber business, also manufactured asbestos-containing products from 1920 until 1971. By the late 1980's, asbestos-related personal injury and death claims against Fibreboard numbered in the tens of thousands. At that time Fibreboard had approximately $100 million in hard insurance assets available to pay these claims. It also had disputed coverage claims against two of its insurers, Continental Casualty Company and Pacific Indemnity. These coverage claims ultimately played a key role in the class settlement.

Continental issued a general liability policy to Fibreboard in 1957 which remained in force for two years. Although the policy had no aggregate limit, it had a per-occurrence limit of $1 million and a per-person limit of $500,000.

Fibreboard contended that Continental's policy replaced a similar Pacific policy with a per-claim limit of $500,000 but no aggregate limit. Fibreboard contended that these two policies provided coverage to Fibreboard for

thousands of claimants. This argument rested on Fibreboard's "continuous trigger" theory which maintained that the policies covered Fibreboard if the claimant had been exposed to asbestos at any time before or during the time the policies were in force, provided the claimant at some time was exposed to Fibreboard's asbestos product.

In 1979, Fibreboard and other insureds filed a massive multi-party insurance coverage case in California state court against a number of insurers, including Pacific and Continental. Following years of litigation, including a trial extending over four years, Fibreboard prevailed in the trial court. In its 1990 opinion, the trial court accepted Fibreboard's continuous trigger theory as well as Fibreboard's argument that the insurer was required to pay the full cost of defense for each claim covered.

The insurers appealed to a California intermediate appellate court. Argument was held in August 1993 while the settling parties in this case were attempting to reach a final agreement.

By 1988, Fibreboard had largely exhausted its coverage from insurers other than Pacific and Continental. It was unable to pay asbestos judgments and settlements as they occurred and also pay the continuing mounting defense costs. After the trial court in the coverage case issued several rulings in favor of Fibreboard, Fibreboard was able to develop a "structured settlement" program where payments to settle claims were deferred until resolution of the coverage case. Under this plan, most plaintiffs agreed to accept 40% cash up front with the balance due upon resolution of the coverage dispute. Additionally, Fibreboard agreed not to dissipate its

assets and, in effect, to give the company to the plaintiffs if it lost its coverage case.

By mid-1990, Fibreboard's defense costs and settlement payments had mounted and Fibreboard looked for additional insurance resources. It proposed to both Continental and Pacific that they negotiate a complete settlement of its coverage claims. Continental declined to negotiate. Pacific, however, negotiated with Fibreboard and ultimately agreed to a settlement, "the Pacific Agreement." By this settlement, which was subject to a number of contingencies, Pacific's coverage was made available for claimants exposed to Fibreboard's asbestos products after 1959. The Pacific Agreement also purported to extinguish Continental's right to seek contribution from Pacific. Continental challenged this agreement in the District Court for the Eastern District of Texas in April 1993.

Even with the Pacific Agreement, Fibreboard faced acute problems with increased large-scale asbestos litigation. In early 1991 it proposed an "assignment settlement" plan to plaintiffs' counsel. Unlike the earlier program, this plan allowed asbestos claimants to settle their claims against Fibreboard for an agreed sum, receive no cash up front but rather receive an assignment of Fibreboard's rights (to the extent of the settlement) against Continental. Fibreboard agreed to pay the settlement sum if the court ultimately exonerated Continental. Under this plan, the settlement was also contingent upon Fibreboard obtaining court orders validating its right to make an assignment in the face of an insurance policy provision barring Fibreboard from settling claims without Continental's consent. Plaintiffs' counsel recognized the risk that their clients would never receive the

agreed-upon settlements under the assignment plan and pressed for higher settlement amounts for accepting this risk. Fibreboard, using Continental dollars, was willing to pay more. As a result, the average per-case settlement amount under the assignment plan more than doubled the average amount of the earlier structured settlements. Continental strongly disputed Fibreboard's right to make these assignments. This dispute led to further costly litigation.

In June 1992, a California trial court in *Andrus v. Fibreboard*[1] ruled in favor of Fibreboard and upheld Fibreboard's right to make the assignment settlements. The California intermediate appellate court denied writs, relegating Continental to review under the ordinary appellate process.[2]

In 1990 and 1991 Fibreboard broached the subject of a global settlement with Ron Motley, Joe Rice, Steven Kazan and Harry Wartnick, all of whom were leading plaintiffs' asbestos counsel. Fibreboard proposed to use an assignment plan to accomplish the global settlement. Fibreboard sought to structure the settlement so that claimants would look only to its insurance assets if it won the coverage case and Fibreboard would give the company to claimants if it lost the coverage case. As Fibreboard's counsel later admitted at the fairness hearing, this approach was designed in part to "bring the [asbestos] litigation closer to Continental; it was

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[1]No. 614747-3 (Alameda Cty.Sup.Ct. June 1, 1992) *reversed* by *Fibreboard Corp. v. Continental Casualty Co.*, No. A059716 (Cal.App., October 19, 1994).

[2]The trial court's decision in *Andrus* was reversed by the California appellate court in October 1994 after the Global Settlement Agreement was reached but before the fairness hearing was held.

important that Continental feel as threatened as Fibreboard did."

Fibreboard was not successful in negotiating a global settlement with plaintiffs' counsel. Fibreboard and the Ness Motley firm did, however, agree to settle at least 20,000 present asbestos claims with the possibility of expanding that number to a higher figure. Fibreboard again agreed to assign rights under the Continental policy instead of paying cash to fund this settlement. The higher settlement amounts necessary to accomplish these assignment settlements caused a further inflation of settlement values. With the conclusion of this Ness Motley settlement agreement, Fibreboard had entered into $943 million in assignment settlements during 1992 and had deferred settlement obligations at the end of that year aggregating over $1.2 billion, a sum that greatly exceeded its net worth.

As called for under this latest settlement, Fibreboard brought suit in the Eastern District of Texas seeking a determination that the assignment did not violate the Continental policy. Plaintiffs' counsel advised Continental that they had bound themselves contractually with Fibreboard to refrain from negotiating directly with Continental without Fibreboard's consent. Continental knew that Fibreboard and plaintiffs' counsel were actively engaged in negotiating a global settlement to be funded with Continental's money.

Thus, at the beginning of 1993, Continental was under intense pressure to join the settlement talks:

Continental had been unable to obtain immediate review of the California trial court judgment in Andrus approving the unilateral assignment settlements.

Fibreboard continued to close more and more assignment settlements at amounts Continental considered grossly excessive.

Fibreboard and plaintiffs' counsel were seriously negotiating a multi- billion dollar settlement which Continental would be called upon to fund. And Continental was barred from the table.

A new proceeding, in a forum Continental probably considered unfriendly, had been filed seeking validation of Fibreboard's assignment settlements.

In February 1993, Continental announced that it would seek a global resolution of its asbestos exposure under its Fibreboard policies. With the approval of the parties, Judge Parker named Judge Patrick E. Higginbotham of this court to serve as settlement facilitator.

In the settlement discussions with Judge Higginbotham, Continental made it clear from the beginning that it would only entertain a global settlement if the settlement brought "total peace." Continental was unwilling to pay billions in settlement and forego its substantial arguments against coverage without the assurance that it did not face unknown liabilities in the future. Thus, Continental was only interested in exploring a mandatory, non-opt-out settlement. Continental considered that an opt-out class presented it with a number of insurmountable problems:

Because the deadline for opting out would likely come after a decision in the coverage appeal, plaintiffs would enjoy a one-way option: they could opt out if Continental lost the appeal but remain in if Fibreboard lost.

Claimants with the most serious injuries were likely to opt out in disproportionate numbers.

Accurate predictions of Continental's exposure to opt outs were extremely difficult, if not impossible, to make.

Skirmishes between Continental and Fibreboard initially prevented fruitful discussion. Fibreboard argued that Continental was barred contractually from direct discussions with plaintiffs' counsel. Fibreboard also threatened to continue its assignment settlements.

With Judge Higginbotham's help, the parties agreed to put these impediments behind them in an agreement signed on April 9, 1993. Fibreboard agreed to allow Continental a place at the negotiating table and to stop the assignment settlements. Continental agreed to fund 100% of any global settlement (Continental reserved the right to get whatever contribution it could from Pacific) and to use its best efforts to work with Fibreboard to reach a global settlement.

From April until July the parties attempted to negotiate a global settlement but these efforts met with little success. For a number of reasons Judge Higginbotham recommended and the parties agreed that they should first attempt to settle the Ness Motley inventory of some 45,000 present claims. On August 5, the parties reached the "Substitute Ness Motley

Agreement" which was approved by the court on August 9.[3]

With the Ness Motley settlement behind them, the parties intensified their efforts to reach a global settlement. The August 27 date for oral argument in the California Court of Appeal in the coverage case injected a sense of urgency into these discussions. Plaintiffs' counsel realized that if Fibreboard lost the coverage case, Continental's funds, essential to any settlement, would be lost. Fibreboard faced immediate bankruptcy if it lost the coverage case. Continental and Pacific faced staggering liability in an unquantifiable amount if they lost the coverage case. The parties had reason to believe that the California appellate court would render a decision promptly after argument and perhaps give signals at argument on how it would rule. For these reasons all parties were driven to reach a settlement before the California court reached a decision in the coverage case.

At Judge Higginbotham's request, Judge Parker designated Messrs. Rice, Cox, Kazan, and Wartnick to "negotiate ... the prospect of a Rule 23(b)(1)(B) settlement class composed of future plaintiffs with claims against Fibreboard."

A series of intense negotiating sessions followed. The absence of Pacific at the table remained a serious impediment and little progress was made. Over the weekend of August 21-22, faced with an impending trial on Continental's claims

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[3]In the Substitute Ness Motley Agreement, Continental agreed to pay a higher-than-average value per claim with one-half due at closing and the remainder contingent on the outcome of the coverage case or on the existence of a settlement. This agreement was used as a model to settle inventory claims of other law firms.

to invalidate the Pacific Agreement, Pacific agreed to share responsibility with Continental on a 35.29% to 64.71% ratio. This was the same ratio established by the trial court in the coverage case.

This proved to be the last impediment to an agreement. Continental and Pacific were now negotiating jointly. By August 23, Continental and Pacific (the Insurers) had offered $1.5 billion and plaintiffs' counsel demanded $1.7 billion. The parties asked Judge Parker to assist in a last-ditch effort to reach agreement before August 27.

Judge Parker and counsel spent the afternoon of August 26 in intensive negotiating sessions in an attempt to resolve the remaining differences between the parties. Late in the afternoon when settlement had not been reached, Judge Parker invited a core group of attorneys to his home outside of Tyler to continue the discussion. After several hours of negotiations in this more informal setting, Continental agreed to contribute an additional $25,000,000 and Fibreboard agreed to contribute $10,000,000. Plaintiffs' counsel refused at this point to accept the $1.535 billion pot. But later, the key parties, by coincidence, met around midnight at a Tyler coffee shop. Plaintiffs' counsel, at that time, agreed to accept the tendered $1.535 billion global settlement offer.

On the morning of August 27, plaintiffs' counsel renewed a demand that there be a separate, back-up settlement between Fibreboard and the Insurers for the settlement of the coverage case if, for any reason, a court declined to approve the global settlement. The parties negotiated the entire day on August 27. Near the end of the day a settlement (termed the "Trilateral Settlement") among Continental, Pacific and

Fibreboard was reached. These negotiations were undoubtedly shortened because the coverage case appeal was argued on the morning of August 27. The negotiating representatives received word after the argument that the court had announced that it intended to decide the case expeditiously.

Upon announcement of the settlement agreement in open court in Tyler on August 27, the parties directed communication to the California Court of Appeal advising the court of the agreement in principle.

The parties asked the California court to defer a ruling on the issues relating to Fibreboard's dispute with Continental and Pacific pending completion of the necessary settlement documentation. The California Court of Appeal has continued to withhold a ruling pending final approval of the Trilateral Settlement.[4] The parties then set out to convert the Global and Trilateral Settlements into formal written agreements. They first addressed the Trilateral Settlement. Disputes arose over critical features of this agreement and it was not until October that Continental, Pacific and Fibreboard were able to reduce it to writing.

On September 9th, the *Ahearn* class action was commenced by the Global Health Claimant Class against Fibreboard. The Global Health Claimant Class consists of all persons with personal injury claims against Fibreboard for

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[4]After oral argument, the court granted a motion to sever issues unique to Fibreboard, Pacific and Continental in order to facilitate the Trilateral Settlement. Its decision regarding the claims of other participants in the case is *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co. et al.*, 45 Cal.App.4th 1, 52 Cal.Rptr.2d 690 (1996).

asbestos exposure whose claims had not been brought in a lawsuit, settled or included in a settlement agreement before August 27, 1993. Shortly after *Ahearn* was filed, Judge Parker entered a number of orders: Continental and Pacific were granted leave to intervene as party defendants; provisional class certification was granted; a TRO against commencement of further separate litigation against Fibreboard by putative class members was entered; and the court appointed as counsel to the plaintiff class, Rice, Cox, Kazan and Wartnick, and appointed Caplin & Drysdale as counsel to plaintiffs' counsel.

In October, Judge Parker appointed Professor Eric Green of the Boston University School of Law to serve as guardian ad litem for the class. Judge Parker noted

> that it would be desirable that there be the appointment of [a guardian] ad litem who is fully knowledgeable in asbestos mass tort matters but does not actively represent asbestos claimants. The function of the [guardian] ad litem is to review the settlement from the point of view of members of the class and thereby to afford the class additional assurance that their interest will be adequately protected.

Professor Green was directed to render a report to the court analyzing the fairness, reasonableness and adequacy of the settlement from the point of view of the members of the provisionally certified Global Health Claimant Class.

Plaintiffs' counsel then turned to documenting the Global Settlement Agreement. The parties did not resolve the hundreds of details necessary to complete this document until December 23. As Judge Parker noted, it was not until that date when the

Global Settlement Agreement was signed that it became "clear that a final agreement would actually be reached."

B. Terms of the Settlements

1. The Global Settlement Agreement

The Global Settlement Agreement provides for the establishment of a trust, funded with $1.535 billion--the proceeds of the settlement. The trust is charged with administering and paying all of the Global Health Claimant Class members' asbestos-related personal injury and death claims against Fibreboard and the Insurers. Once the global settlement receives judicial approval, and the trust is fully funded, the Class members' claims against Fibreboard and the Insurers will be directed to the trust for processing and payment according to the procedures provided in the trust distribution process.

The trust is to be managed by three trustees and subject to the general supervision of the court.

The Global Settlement Agreement seeks to provide, through the trust, a simple process for injured persons to quickly obtain a fair resolution of their claims and at the same time safeguard their ultimate right to resort to the tort system. The settlement further seeks, through spendthrift provisions, to limit the amount of the trust assets that can be paid out in any given year.

This will protect assets so that they will be available to compensate injured class members whose claims develop far in the future. If a shortfall occurs in any year, payments during that year are prioritized so that the sickest claimants are paid first.

Under the Global Settlement Agreement, a claimant must first seek to settle with the trust after providing requisite information to allow for evaluation of his claim. If no settlement is reached, the claimant will next proceed to mediation to attempt to resolve his differences with the trust. If the mediation fails, the claim will be submitted to arbitration, either binding or non-binding at the claimant's choice. If non-binding arbitration does not result in a resolution of the claim, a judge or judge's designee from the Eastern District of Texas will hold a settlement conference. If this does not produce a settlement, the claimant may proceed against the trust in the tort system, complete with a jury trial if requested. The recovery of the claimant in the tort system, however, is subject to a cap of $500,000 per claim and recovery of punitive damages is precluded. Attorneys' fees for claimant's counsel are limited to 25% of the compensation paid to the claimant. Any resulting judgment will be paid out over a period of years depending upon the financial condition of the trust at the time.

As consideration for their $1.535 billion payment, Fibreboard and the Insurers receive full releases from the Global Health Claimant Class for their asbestos-related claims. Fibreboard and the Insurers also release each other from all claims.

2. The Global Third-Party Claimant Class Settlement

This settlement is between representatives of Fibreboard's major co-defendants on the one hand and Fibreboard and its Insurers on the other. The settlement preserves credit rights for co-defendant third parties under the law of the forum. Where the claimant liquidates his claim against the trust before proceeding to judgment against the co-defendant third party, the third party receives whatever credit

local law allows against the judgment. Any third- party co-defendant who suffers a judgment before the trust settles with the plaintiff and pays a Fibreboard share, succeeds to the plaintiff's rights against the trust, except for exit to the tort system. The Global Third-Party Claimant Class releases Fibreboard and the Insurers as to all third-party claims for contribution and indemnity arising from the claims of Global Health Claimant Class members and agrees that approval of the Global Settlement Agreement will bar and enjoin Global Third-Party Claimant Class members from prosecuting any such claims against Fibreboard or the Insurers. Fibreboard and the Insurers in turn, release the Global Third-Party Claimant Class from any and all contribution and indemnity claims.

3. The Trilateral Settlement Agreement

The Trilateral Settlement Agreement compromises the longstanding coverage disputes between Fibreboard and the Insurers, Continental and Pacific. This settlement is to remain effective even if the Global Settlement Agreement ultimately fails to obtain judicial approval. With limited exceptions, the Trilateral Settlement fully discharges the Insurers from all of their Fibreboard policy obligations--both personal injury and non-personal injury claims. The Trilateral Settlement is not designed to settle any asbestos claims against Fibreboard. If the global settlement for some reason fails, the asbestos claimants may pursue Fibreboard in the tort system. If the Global Settlement Agreement is not finally approved but the Trilateral Settlement Agreement is, the Insurers will make available to Fibreboard a total of $2 billion to enable Fibreboard to defend and resolve asbestos-related claims filed against it.

C. Notice and Hearing

After a comprehensive campaign designed to give notice of the proposed settlements, the district court allowed wide-ranging discovery. The court allowed the Ortiz and Flanagan appellants to intervene to assist in making the record "relating to the fairness, reasonableness and adequacy of the proposed settlement--to assist the court in its ultimate decision in this case."

Thereafter the court held a comprehensive eight-day fairness hearing. In addition to issues relating directly to the adequacy of the settlement fund, the court heard expert testimony on the potential outcome of the coverage case appeal. Two experts, retired California Supreme Court Justice Marcus Kaufman and Yale Law Professor, George Priest, gave opinions that Fibreboard's trial court victory on coverage would be reversed by the California appellate courts. These witnesses testified that Fibreboard faced a substantial risk that its extensive assignment settlement program constituted a massive breach of the policy.[5]

Following the hearing, the court made detailed findings and concluded that the Global Settlement Agreement was fair, adequate and reasonable to the class and that the requirements for mandatory class certification under Federal Rules of Civil Procedure 23(b)(1)(A), (b)(1)(B) and (b)(2) were met. *D. Rudd*

After the Trilateral Settlement between Fibreboard and the Insurers was reached, the Insurers insisted upon a judicial determination that the settlement was fair, reasonable and

[5]*See* discussion of *Andrus* at note 2 and accompanying text.

non-collusive and operated to terminate any rights claimants might otherwise have against the Insurers arising out of the policies. The Rudd action was filed to accomplish this purpose. The Insurers thus brought a declaratory and injunctive action in the Eastern District of Texas against two mandatory (non-opt-out) defendant classes: (1) the Trilateral Health Claimant Class--substantially the same as the Ahearn futures class, and (2) the Trilateral Third-Party Claimant Class, comprised of third parties with asbestos-related claims against Fibreboard. The district court appointed experienced counsel to represent each class.[6] Notice was then given to the classes informing them of the pendency of the action. Broad discovery was conducted and trial was held on February 13, 1995.

Following trial, the class representatives and counsel for both of the defendant classes advised the district court that they had concluded that it was in the best interest of these classes to consent to the relief the Insurers were seeking. Counsel filed position papers explaining their reasons. Notice of the class representatives' consent to the terms of the Trilateral Settlement was sent to the members of the two classes. Following a fairness hearing, the district court issued findings of fact and conclusions of law approving the classes' consent and certifying both classes as mandatory non-opt-out defendant classes pursuant to Rules 23(b)(1)(A), (b)(1)(B) and (b)(2) of the Federal Rules of Civil Procedure. Only two individuals represented by Leonard C. Jaques, Esq., challenge the district court's orders in this appeal. No member of the Trilateral

[6]Class counsel for the Trilateral Health Claimant Class was James E. Coleman, Jr., of the law firm Carrington, Coleman, Sloman & Blumenthal, L.L.P. Class counsel for the Trilateral Third-Party Claimant Class were the same attorneys that represented the Global Third-Party Claimant Class.

Third-Party Claimant Class and none of the other intervening parties in *Ahearn* have lodged objections to *Rudd*.

II. AHEARN

Appellants challenge *Ahearn* on a number of grounds which we consider below. The Ortiz intervenors are members of the Global Health Claimant Class who challenge certification of the class and the approval of the settlement. The Flanagan intervenors, also members of the Global Health Claimant Class, challenge certification in Ahearn and raise several objections specific to Rudd. We will refer to both groups of appellants collectively as "the intervenors."

A. Rule 23(a)

Rule 23(a) lists four prerequisites to a class action: (1) numerosity, (2) commonality, (3) typicality and (4) adequacy of representation. The district court found that all four of these prerequisites were satisfied. The intervenors do not dispute the district court's finding of numerosity, but argue that the Global Health Claimant Class meets none of the other prerequisites to a class action.

The intervenors argue that the district court erred by considering the circumstances surrounding the settlement and the evidence adduced at the fairness hearing in making findings under Rule 23(a). This argument is contrary to Fifth Circuit precedent and would require a court to ignore important and relevant information that sits squarely in front of it when deciding whether to certify a settlement class. In *In re Corrugated Container Antitrust Litigation (Container I)*, we held that the district court should consider the settlement in deciding whether the settlement class satisfied the prerequisites

of Rule 23. 643 F.2d 195, 211 (5th Cir.), *aff'd*, 659 F.2d 1322 (5th Cir.1981), *cert. denied*, 456 U.S. 998, 102 S.Ct. 2283, 73 L.Ed.2d 1294, and *cert. denied*, 456 U.S. 1012, 102 S.Ct. 2308, 73 L.Ed.2d 1309 (1982). We rejected a challenge to the district court's finding that the class was adequately represented as required by 23(a)(4) and found that the terms of the settlement were vitally important to the determination that certification was appropriate. *Id.* Most circuits to decide the issue have held that courts should consider the settlement in determining whether Rule 23 prerequisites are satisfied. See *Malchman v. Davis*, 761 F.2d 893, 900 (2d Cir.1985) (certification appropriate because "the interests of the broadened class *in the settlement* were commonly held") (emphasis added); *White v. National Football League*, 41 F.3d 402, 408 (8th Cir.1994) *cert. denied* --- U.S. ----, 115 S.Ct. 2569, 132 L.Ed.2d 821 (1995) ("adequacy of class representation ... is ultimately determined by the settlement itself"); *In re Dennis Greenman Securities Litigation*, 829 F.2d 1539, 1543 (11th Cir.1987) ("in assessing the propriety of class certification, the courts evaluate the negotiation process and the settlement itself"); *In re A.H. Robins Co.*, Inc., 880 F.2d 709, 740 (4th Cir.) *cert. denied*, 493 U.S. 959, 110 S.Ct. 377, 107 L.Ed.2d 362 (1989) ("if not a ground for certification per se, certainly settlement should be a factor, and an important factor to be considered when determining certification"). Only the Third Circuit has refused to look at settlements before it when deciding class certification issues and even that court admits that taking the settlement into account may be "the better policy." *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 617-18 (3d Cir.1996). The rule that a court should consider a proposed settlement, if one is before it, when deciding certification issues makes good sense. Settlements and the events leading up to them add a great deal of information to the court's inquiry and will often expose diverging interests or common issues that were not evident or

clear from the complaint. See Herbert Newberg & Alba Conte, 2 *Newberg on Class Actions* §11.28 at 11-58 (3d ed. 1992) (in settlement class context, common issues arise from the settlement itself).

We are bound to follow Container I's holding that the district court can and should look at the terms of a settlement in front of it as part of its certification inquiry. We would adopt this rule even if we were not bound by precedent because it enhances the ability of district courts to make informed certification decisions.

1. Commonality and typicality

The district court, in its findings of fact, found that the entire Global Health Claimant Class had the following issues in common:

> (i) avoiding the potentially disastrous results of a loss by Fibreboard in the Coverage Case appeal; (ii) maximizing the total settlement contribution from Fibreboard and the Insurers; (iii) streamlining the procedures for the filing, processing and resolution of claims, and thereby reducing transactions costs and delays in compensation; (iv) minimizing the percentage of their compensation diverted from them to pay attorneys' fees; and (v) adopting procedures that provide for payments to claimants in an equitable manner.

The intervenors do not disagree that the settlement class holds these issues in common. Instead, they argue that these issues do not support a finding of commonality because they are derived

from the settlement rather than from the *Ahearn* complaint. As we noted above, this argument has no merit and is foreclosed by our holding in *Container I*. Because the evidence is overwhelming that the class holds the above issues in common under the settlement (even the intervenors concede this point), we agree with the district court that the *Ahearn* action and the Global Settlement Agreement presented it with questions of law and fact common to the entire Global Health Claimant Class.

Typicality focuses on the similarity between the named plaintiffs' legal and remedial theories and the legal and remedial theories of those whom they purport to represent. *Jenkins v. Raymark Indus. Inc.*, 782 F.2d 468, 472 (5th Cir.1986). The district court found that the legal and remedial theories of the representative plaintiffs were typical of the class because all members of the Global Health Claimant Class presented claims based on exposure to Fibreboard asbestos. The district court also found that the named plaintiffs' interests in maximizing recovery for the class and eliminating the risk posed by the insurance coverage litigation were identical to interests held by all members of the class.

The intervenors do not argue that the named plaintiffs' claims rest on theories different from those of the other class members. Instead, in their attempt to show that the class is too diverse to meet the typicality requirement, they point to individual issues such as varying family situations, separate histories of cigarette smoking, differences in medical expenses and differences in state law. These differences will certainly result in significant differences in the amount of damages that each claimant recovers but do not affect the settlement in the least. The Global Settlement Agreement does not award

damages to individual victims:[7] it provides money and an equitable distribution process to pay victims.[8]

The central remedial and legal theory of each of the named plaintiffs, that Fibreboard is liable in tort for damages incurred due to exposure to Fibreboard asbestos, is typical of the entire class. Even the definition of the class makes this clear.[9] Further, the issues that brought the named plaintiffs to settle *Ahearn* are the same issues that the district court found common to the entire class. The named plaintiffs settled *Ahearn* because of their desire to avoid the risks of insurance coverage litigation and to insure that money remains available to pay their claims when they make it through the settlement and/or trial process to final judgment. These same concerns affect each member of the Global Health Claimant Class. We are satisfied

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[7]Determinations of individual damage awards will be made by the trust and the plaintiff's attorney in settlement negotiations or in a full trial on the merits. The back-end opt out provision will force the trust and plaintiffs to consider state law and individual circumstances, such as smoking history, when negotiating damages because the alternative to agreement is a full trial by jury under relevant state law.

[8]This is in stark contrast to the *Georgine* case where the settlement attempted to award damages to class members based on the severity of their injuries alone, 83 F.3d 610 (3d Cir.1996). We would likely agree with the Third Circuit that a class action requesting individual damages for members of a global class of asbestos claimants would not satisfy the typicality requirements due to the huge number of individuals and their varying medical expenses, smoking histories, and family situations. In *Ahearn*, only commonly held questions regarding insurance coverage for the class' injuries and establishment of an equitable distribution process to insure that all class members receive compensation were decided. As a result, this settlement is unaffected by the typicality and commonality problems cited in *Georgine*.

[9]The Global Health Claimant Class consists of persons who have been exposed "to asbestos or to asbestos-containing products for which Fibreboard may bear legal liability...."

that the district court did not abuse its discretion by finding that the issues of law and fact faced by the named plaintiffs were typical of the Global Health Claimant Class.

2. Adequacy of representation

The intervenors argue that the district court should not have certified the Global Health Claimant Class because of impermissible conflicts of interests by class counsel.[10] Rule 23(a)(4) states that a class action may be maintained only if "the representative parties will fairly and adequately protect the interests of the class." This requirement for fair and adequate representation encompasses both class representatives and class counsel. *North American Acceptance Corp. v. Arnall, Golden & Gregory*, 593 F.2d 642, 644 n. 4 (5th Cir.1979). However, "[j]ust what measure of representation is adequate is a question of fact that depends on each peculiar set of circumstances." *Guerine v. J & W Investment, Inc.*, 544 F.2d 863, 864 (5th Cir.1977), citing *Johnson v. Georgia Highway Express Inc.*, 417 F.2d 1122 (5th Cir.1969). The district court has the continuing duty to see that the class is adequately represented. *Guerine*, 544 F.2d at 864.

A district court may not certify a class without concluding that class counsel are " 'qualified, experienced, and generally able to conduct the proposed litigation.' Obviously, an attorney who should be disqualified because of a conflict of interest will not meet this requirement." *North Amer. Acceptance*, 593 F.2d at 644 (quoting *Johnson v. Georgia Hwy. Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir.1969)).

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[10]Intervenors do not challenge the adequacy of representation of class representatives so we do not consider this issue.

In August 1993, the district court, on the recommendation of Judge Higginbotham, formally appointed four counsel (Messrs. Rice, Cox, Kazan, and Wartnick) to represent the Global Health Claimant Class. Messrs. Rice and Cox are partners with the Ness Motley firm, one of the leading U.S. firms representing asbestos claimants. Ness Motley has been engaged in litigation with Fibreboard since 1990. Mr. Kazan is a partner with Kazan, McClain, Edises, & Simon. He has handled asbestos-related cases for about twenty years. Mr. Wartnick is a member of the law firm of Wartnick, Chaber, Harowitz, Smith & Tigerman. His practice has been devoted to representing asbestos claimants since 1981. In addition to their experience in asbestos litigation generally, Messrs. Kazan and Wartnick were Fibreboard's chief litigation adversaries on the West Coast, where Fibreboard is located. The appointed class counsel retained the firm of Caplin & Drysdale to advise them in areas outside their own expertise.

The district court found that these counsel are "prominent attorneys, highly respected for their knowledge, experience, skill and special competence in the field of asbestos litigation" and that they provided "adequate, professional and ethical representation" to the class.

The intervenors do not question the skill, competence or experience of class counsel, but instead argue the existence of impermissible conflicts that prevented them from adequately representing the class. Both sides agree that in determining the existence of a conflict, we look to the ABA Model Rules of Professional Conduct for guidance. Rule 1.7 states:

> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by

> the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Model Rules of Professional Conduct, Rule 1.7(b).

At the fairness hearing, the intervenors and the settling parties each called a legal ethics expert to express an opinion on whether class counsel had conflicts.

The intervenors offered Professor John Leubsdorf, a law professor at Rutgers University Law School who has taught courses in civil procedure and legal responsibility. The district court qualified Professor Leubsdorf as an expert on issues of legal ethics and professional responsibility but found him lacking in practical experience in mass tort litigation.

The settling parties called Professor Geoffrey Hazard, a law professor at the University of Pennsylvania Law School and a recognized scholar in the field of legal ethics and professional responsibility. Professor Hazard was a member of the Rand Civil Justice Institute advisory council for studies concerning asbestos litigation and a reporter to the commission responsible for the preparation of the ABA Model Rules of Professional Conduct. Moreover, Professor Hazard has previously testified

in asbestos cases and has extensive experience as a consultant in this type litigation.

After hearing the testimony of both the legal experts and the negotiators, the district court credited Professor Hazard's testimony as "consistent with existing federal legal principles and the underlying facts of this case." The court found that Professor Leubsdorf's testimony in a number of areas was either not supported by the factual record or contrary to settled federal law. Also, the district court felt that Professor Leubsdorf's conclusions and recommendations often were speculative and impractical because of his insufficient experience in mass torts and asbestos litigation. The record amply supports these findings.

The intervenors argue that class counsel for the Global Health Claimant Class had impermissible conflicts due to concurrent representation both (1) of present asbestos claimants and the Class of future claimants and (2) of purported conflicting subgroups within the class.

a. Alleged conflict between present claimants and the class

The intervenors contend that class counsel by simultaneously representing both present claimants and the class of future claimants represented clients who were directly competing for Fibreboard's limited resources. The district court found that during the negotiations no conflict existed that materially limited counsel's responsibilities to the future claimant class.

In analyzing whether a conflict existed, both Professor Hazard and the guardian ad litem appointed for the futures class, Professor Eric D. Green, divided the three-year negotiations

period into smaller discrete time periods: (1) Early 1991 through April 9, 1993; (2) April 9, 1993, through August 9, 1993; (3) August 9, 1993, through August 27, 1993; (4) August 27, 1993, through October 12, 1993; and (5) October 12, 1993, through December 23, 1993.

(i) Early 1991 through late March 1993

Most of the settlement discussions until late March, 1993 were between only Fibreboard and class counsel. The Insurers did not participate. These exploratory discussions focused on a possible settlement with both present and future claimants combined in an opt-out class. Fibreboard was still seeking to settle by assigning its insurance rights to the class. During this time, Fibreboard continued to settle various law firms' "inventories" of present claims, including claims with the law firms of the four class counsel. Again, Fibreboard accomplished these settlements by assigning its insurance rights against Continental and Pacific; thus, these settlements were contingent on a favorable decision for Fibreboard in the California coverage case.

During this period, Fibreboard executed the initial Ness Motley agreement which settled approximately 20,000 inventory claims with the Ness Motley firm. This agreement required Fibreboard to obtain Continental's consent to this assignment of insurance rights or to seek a court order approving the assignment. In January 1993, Fibreboard filed suit against Continental in the Eastern District of Texas to obtain the court order.

Professor Hazard testified that during this time period no conflict existed between the present and future claimants because all discussions of a global settlement included both

groups and both groups shared the risk of losing the coverage case. If coverage was found and if assignment was not a breach of contract, then the insurance policies of Continental and Pacific offered potentially unlimited coverage.

(ii) April 1993 through August 9, 1993

In March 1993 Continental joined the negotiations and Judge Parker appointed Judge Higginbotham as a settlement facilitator. In an April 9, 1993 agreement, Fibreboard agreed to stop executing assignment settlements and Continental agreed to work toward a global settlement of all present and future claimants, including both pre- and post-1959 exposed claimants. But Continental insisted that the settlement be a mandatory, non-opt-out class and that Pacific contribute to the total settlement fund. Class counsel began to consider a mandatory class, but only if the settlement proceeds were adequate to insure fair restitution to present and future claimants and if a back-end opt-out provision was included. During this period, Continental filed suit in the Eastern District of Texas against both Pacific and Fibreboard seeking a declaration that the Pacific Agreement did not impair Continental's contribution rights against Pacific.

Fibreboard, now joined by Continental, continued negotiations on inventory claims. Specifically, Fibreboard and Continental began negotiations with the Ness Motley firm on a revised Ness Motley agreement. The parties succeeded in reaching the Substitute Ness Motley Agreement on August 5, 1993. Generally, Continental agreed to a higher-than-average value per claim with one-half due at closing and the remainder contingent on the outcome of the coverage case or on the existence of a settlement. Other inventory settlements were modeled after the Substitute Ness Motley Agreement.

Now that Fibreboard's suit against Continental concerning the initial Ness Motley agreement was settled, Continental sought an immediate trial of its suit against Fibreboard and Pacific. Continental's primary objective was to motivate Pacific to join the global settlement negotiations.

The intervenors argue that an impermissible conflict existed because the Ness Motley counsel were simultaneously negotiating for both present claimants (the inventory claims) and the class of future claimants. Professor Hazard testified that the present and future claimants were not competing for the same funds. At this stage of the negotiations, counsel were concentrating on the settlement of their inventory of present claims. It is true that they were also discussing a global settlement, but these discussions were in the preliminary exploratory stage. Certainly, at this time, counsel had no well-formed notions of how much Continental was willing to pay to settle the future claims.[11] For this reason, Professor Hazard explained that each attorney in good faith was attempting to obtain the maximum dollar amounts for present claimants he represented, as well as for the future claimants. Counsel certainly knew in a general way that there was a sum beyond

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[11] As Professor Hazard testified:

Q Well, to your knowledge, did the reality ever occur here to the plaintiff's lawyers that there would not be enough money to pay all future claimants?

A. They confronted a situation in which there was an external event creating a severe risk that that could happen. If Fibreboard won the coverage litigation without qualification as to the extent of the coverage, then there was enough money to the extent of the insurance company's resources, which I take it for practical purposes [sic] without limit; that is they would have to charge present policyholders to pay the money, but presumably if they stayed in the business they could do that.

which Continental would not pay. But because they did not know that limit, they did not know that this limit would be less than an amount they were willing to accept in settlement for both classes of claimants.[12] As the district court found, the Substitute Ness Motley Agreement likely aided the global settlement by increasing the average value per claim. We are persuaded that the record supports the district court's conclusion that class counsel vigorously represented both the present claimants and their future claimant clients against the same defendant.

(iii) August 9, 1993, through August 27, 1993

On August 9, 1993, on the recommendation of Judge Higginbotham, the district court appointed Messrs. Rice, Cox, Kazan, and Wartnick to negotiate the prospect of a settlement

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[12]Professor Hazard discussed the difference between the real-world concept of conflict of interest with the imaginary concept of a reserve price:

> Q. That's your opinion, whether or not there's an ethical violation depends upon the reasonableness of the settlement? Is that right?
>
> A. It depends--I think the judge said--I think I heard him to say the circumstances. That is, the conflict of interest is a real-world concept, not a theoretical concept. Therefore, one has to consider the real-world circumstances. Economists do a lot of thinking about--how shall we say-- the potential of reality. A reserve price in the context of real-world negotiation is an imaginary number. The person who offers the money finally doesn't know what he is going to offer until he offers it. He may have the clearest idea, the firmest opinion, the strongest wish, and yet you can have a settlement or there will be a few bucks more. How do you possibly reconcile the notion that he had a firm, irreducible, unremovable, firm reserve price with the fact that he settled for a little bit more? It's because you're talking about different kinds of things.

class composed of future claimants. The court knew that this settlement would have to be reached before the decision in the coverage case, which was expected on August 27, 1993. The court felt compelled due to this severe deadline and to the complexity of the issues to appoint only highly competent and experienced attorneys who understood asbestos litigation. Professor Leubsdorf testified that the court should have required all class counsel to settle their present claims for cash or should have appointed other counsel. The district court did not err in concluding that this suggestion was impractical and would have seriously impeded any settlement.

From August 9, 1993, to August 27, 1993, appointed counsel negotiated a global settlement. On August 22, 1993, Continental and Pacific reached an agreement to settle their dispute, vastly improving the odds of a global settlement. The district court found that all negotiations during this time were vigorous, contentious, and at arm's length. Professors Hazard and Green both testified that the future claimants were not impaired by counsel's representation of present claimants during this period. Indeed, they found that the present claimants had a substantial interest in a global settlement because such a settlement would secure their contingent back-end payments under the Substitute Ness Motley Agreement. Class counsel were also aware that any class settlement must be approved by the court and would face meticulous scrutiny. Thus, the present and future claimants had two common interests in reaching a settlement. First, they both wanted to avoid the risk of Fibreboard losing the coverage case. Second, they both wanted a diligently negotiated settlement: the future claimants wanted the settlement that yielded them maximum dollar recovery; the present claimants wanted a settlement that would withstand intense judicial scrutiny.

(iv) August 27, 1993, through October 12, 1993

From August 27, 1993, after announcing the Global Settlement Agreement in principle in open court, until October 12, 1993, when the Trilateral Settlement Agreement was reached, class counsel conducted no negotiations on the terms of the Global Settlement Agreement. On October 12, 1993, the district court appointed Professor Green as the guardian ad litem of the futures class.

(v) October 12, 1993, through December 23, 1993

From October 12 to December 23, 1993, when the Global Settlement Agreement was executed, the settling parties negotiated the specific terms of the agreement. By this time, the Trilateral Settlement Agreement had already been executed and would have triggered the back-end payments for the present clients in the Ness Motley or similar agreements even if the global settlement failed. Thus, the present clients' settlement was secured and they no longer had an interest in a global settlement. The record supports the district court's finding that the negotiations during this period were vigorous and that the class was adequately represented.

Thus, the district court considered the intervenors' conflicts argument for the entire time the settlement negotiations were underway and found that, at no time, did a material limitation on the representation of the class by class counsel exist due to concurrent representation of present and future claimants. The court did not err in reaching this conclusion.

b. The alleged intraclass conflicts

On appeal, the intervenors assert only two claims of intraclass conflict: (1) interests of class members who presently have an asbestos- related illness (the "near" futures) and members whose illness will not be apparent for many years (the "far" futures); and (2) interests of class members exposed pre-1959 and members having only post-1959 exposure.

Whether a conflict exists is governed by Rule 1.7(b) as discussed above. Not every intraclass conflict, however, will preclude approval of the settlement for inadequate representation. *See Container I*, 643 F.2d at 207- 08.

The district court found that neither subclasses nor separate negotiating attorneys were required because no material intraclass conflict existed. The court found the common interests far outweighed any divergent interests the intraclass groups might have. The court enumerated those common interests as follows: avoiding the catastrophic results of a loss by Fibreboard in the coverage case appeal; maximizing the total settlement contribution from Fibreboard and the Insurers; streamlining the procedures for the filing, processing, and resolution of claims, thereby reducing transaction costs and delays in compensation; minimizing the percentage of their compensation diverted from the fund to pay attorney's fees; and adopting procedures that provide for payments to claimants in an equitable manner.

Intervenors suggest two intraclass conflicts. First, they argue that the "near" futures would prefer a settlement agreement that places no limits on the amount an individual may recover because these claimants do not anticipate that Fibreboard's assets will be depleted before their claims mature.

The "far" futures, on the other hand, would prefer to limit individual claims to conserve funds so that resources will be available to pay for their future illnesses.

Professors Hazard and Green found no conflict between these two groups that would materially impair the performance of class counsel. Specifically, each found that the common interest in avoiding a lack of coverage vastly overwhelmed any differences between these groups. The "near" futures have no assurance that they would fare better in the absence of the Global Settlement Agreement. These claimants would face the risk that Fibreboard would live up to its pledge to actively defend any claims and delay any recovery. These claimants would also face the risk of attrition of available funds from increased legal fees. Under the Global Settlement Agreement the entire class is benefited by the greater likelihood that funds will be available to compensate both "near" and "far" future claimants under a less complicated system.

The intervenors rely on *In re Joint Eastern & Southern District Asbestos Litigation (Findley)*, 982 F.2d 721 (2d Cir.1992) to support requiring subclasses for the "near" and "far" futures. In a settlement trying to save the Manville Trust from insolvency, the Second Circuit held that subclasses were required for a Rule 23(b)(1)(B) non-opt-out class because of clear conflicts between class members. More particularly, the Second Circuit did require subclasses for groups comparable to our "near" futures and "far" futures. But the terms of the Manville Trust required that conclusion: significantly, the Second Circuit opinion makes it clear that a "near" future claimant was assured of recovery under the Manville Trust instrument if the claim was filed before the Trust ran out of money because the Trust operated on a strict order-of-filing priority. The settlement abandoned this priority to the prejudice

of the near futures. Counsel, in negotiating such a settlement, had a clear conflict between the "near" futures whose recovery rights were secure and the "far" futures who had no such security. As explained above, our "near" future claimants without the Global Settlement Agreement are not assured of a priority payment and have no assurance that funds will be available or when funds can be obtained if they are required to litigate with Fibreboard.

Next, intervenors argue that counsel could not represent claimants who were exposed before 1959 and after 1959 in negotiating a global settlement. They contend that this conflict exists because a pre-1959 exposure claimant's case has a higher settlement value than a post-1959 exposure claimant's. This is premised on the argument that pre-1959 claimants have a greater likelihood of available insurance coverage because both Continental and Pacific insurance policies covered only pre-1959 asbestos exposure. The Intervenors recognize that the Pacific Agreement gave Fibreboard $330 million to use in post-1959 claims. They argue however that Continental affords potential unlimited fund coverage to the pre-1959 claimants.

Professors Hazard and Green both found no substantial conflict between pre- and post-1959 claimants. Both pre- and post-1959 claimants share the common class interests recited above. Neither the Substitute Ness Motley Agreement, the Trilateral Settlement Agreement, nor the Global Settlement Agreement distinguish between these two groups of claimants in any way. To distinguish between the two groups in the Global Settlement Agreement was impractical because the class had no chance of persuading Fibreboard to agree to a settlement that did not address the claims by both groups. Also, to maintain the distinction in the Global Settlement Agreement

would have undermined the attempts to provide maximum compensation and an efficient, streamlined process to claimants.

The district court made the following findings of fact: (1) all negotiations were vigorous and at arm's length, often conducted under the auspices of Judge Higginbotham; (2) common interests within the class overwhelmed minimal conflicts; (3) the settlement treated all class members the same; and (4) the Global Settlement Agreement was fair and reasonable, a finding that the intervenors have not appealed. The independent guardian ad litem also found that class counsel had no conflicts and that the Global Settlement Agreement was fair and reasonable and was the best alternative available. The district court did not abuse its discretion in finding that the class was adequately represented and that subclasses were not required.

B. Certification Under 23(b)(1)(B)

We turn next to the intervenors' challenge to class certification under 23(b)(1)(B).

Rule 23(b) states that where the prerequisites of 23(a) are met, a class action may be maintained if (1) the prosecution of separate actions by or against individual members of the class would create a risk of

> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

Fed.R.Civ.P. 23(b).

The district court found that the prosecution of separate actions by members of the Global Health Claimant Class would substantially impair or impede the ability of other members of the class to receive full payment for their injuries from Fibreboard's limited assets. This finding has strong support in the record and is not clearly erroneous. The district court heard expert testimony on the probable number, mix and timing of future asbestos personal injury claims against Fibreboard, the anticipated costs of defense relating to such claims, and the present value of Fibreboard's non-insurance assets. The experts agreed that Fibreboard faced enormous liability and defense costs that would likely equal or exceed the amount of damages paid out. More importantly, these experts testified that even under the Trilateral Settlement Agreement where Fibreboard is given $2 billion in insurance money to add to its own value of approximately $235 million, Fibreboard would be unable to pay all the valid claims against it within five to nine years. The district court credited the testimony of these experts and found that Fibreboard is a limited fund.

1. Rule 23(b)(1)(B) and the Bankruptcy Code

The intervenors argue that if the reason Fibreboard is a limited fund is because it will become insolvent before it pays all claims, then the Global Settlement Agreement is an impermissible attempt to circumvent bankruptcy proceedings and bankruptcy's absolute priority rule.[13] This argument fails to consider (1) decisions of other courts which have certified

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[13]The absolute priority rule requires that more senior creditors (such as tort creditors) be paid in full before junior claimants (such as shareholders) receive any distribution from an insolvent company.

23(b)(1)(B) classes because the claims of the class would bankrupt the defendant, (2) the significance of Fibreboard's settlement with its insurers in driving the Global Settlement Agreement, (3) the plain meaning of Rule 23, and (4) the nonexclusivity of the Bankruptcy Code and its inferiority to a 23(b)(1)(B) class action in the instant case.

Other courts have uniformly found that, in appropriate and limited circumstances, potential or probable insolvency of a defendant can create a limited fund appropriate for adjudication under Rule 23(b)(1)(B). The Second Circuit, in *In re Joint Eastern and Southern District Asbestos Litigation (Findley)*, upheld the district court's conclusion that the likely insolvency of the Manville Trust rendered it a limited fund and qualified it for treatment under Rule 23(b)(1)(B). 982 F.2d 721, 739 (2d Cir.1992) (cited with approval in *In re Joint Eastern and Southern District Asbestos Litigation (Findley)*, 78 F.3d 764, 777-79 (2d Cir.1996)). In *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285 (2d Cir.1992), the Second Circuit approved a 23(b)(1)(B) class action on the ground that individual litigation would reduce the recovery for all plaintiffs from Drexel's limited assets. *Id.* at 292. See also, *In re Joint Eastern and Southern District Asbestos Litigation (Eagle-Picher Industries)*, 134 F.R.D. 32, 34 (E. & S.D.N.Y.1990); *Coburn v. 4-R Corporation*, 77 F.R.D. 43 (E.D.Ky.1977).

In fact, even courts that have refused to certify 23(b)(1)(B) classes have done so on the ground that the parties seeking class certification have failed to present sufficient evidence that the assets of the defendant are insufficient to pay the claims against it. See *In re Temple*, 851 F.2d 1269, 1272 (11th Cir.1988); *In re School Asbestos Litigation*, 789 F.2d 996, 999 (3d Cir.1986); *In re Bendectin Products Liability*

Litigation, 749 F.2d 300, 305-06 (6th Cir.1984); *In re Northern District of California Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847, 852 (9th Cir.1982); *Green v. Occidental Petroleum Co.*, 541 F.2d 1335, 1340 n. 9 (9th Cir.1976); *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718 (E.D.N.Y.1983); *Payton v. Abbott Labs*, 83 F.R.D. 382, 389 (D.Mass.1979).

In support of their claim that *any* 23(b)(1)(B) limited-fund action based on a defendant's insolvency is an improper circumvention of the Bankruptcy Code, the intervenors can rely only on dicta from *In re Joint Eastern and Southern District Asbestos Litigation (Keene)*, 14 F.3d 726 (2d Cir.1993).[14] The intervenors' conclusion is contrary to the overwhelming majority of court decisions on this issue, ignores crucial facts in both *Ahearn* and *Keene* and reads *Keene* in a way that creates an intra-circuit split in the Second Circuit.

Ahearn's Global Settlement Agreement was undisputedly driven by insurance coverage litigation between Fibreboard and its insurers which created a serious risk for all parties to the agreement. The Global Health Claimant Class and Fibreboard faced the real possibility that Fibreboard would be insolvent simply on the basis of claims already settled. The Insurers, on the other hand, faced the possibility of virtually unlimited liability for damage caused by Fibreboard asbestos. This pressure, felt by all parties to the global settlement, is what finally brought them together on the eve of the coverage case

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[14]Notwithstanding the *Keene* court's gratuitous discussion of its concerns about use of a class action to circumvent bankruptcy laws, the court's *holding* is that the case was properly dismissed because the plaintiff-manufacturer had no cognizable claim against the defendant class member. *Keene*, 14 F.3d at 733.

appeal. The unique risks posed by the coverage cases distinguish *Ahearn* from a blatant attempt to circumvent the Bankruptcy Code such as occurred in *Keene*.

The facts of *Keene* further distinguish it from our case. First, an already weak Keene attempted to avoid impending bankruptcy by asking the court to coerce its tort victims to settle claims in a court where no claims were filed against Keene. Second, Keene attempted to utilize the 23(b)(1)(B) injunction to halt pending actions in other courts. Third, and most importantly, Keene's complaint was dismissed on the ground that it failed to present the court with any case or controversy because it requested only that the court compel all plaintiffs in suits against Keene to appear and negotiate.

Ahearn by comparison, presents us with claims against a healthy company for personal injuries and a proposed settlement of those claims. *Ahearn* presents no danger that Fibreboard may simply be abusing this proceeding to delay other actions or to improve its negotiating position with present claimants because it only enjoins future proceedings, not those already pending. We agree with the *Keene* court that under the facts presented to it, a 23(b)(1)(B) action was not appropriate. We also agree that, in the vast majority of cases, the Bankruptcy Code should govern the distribution of an insolvent entity's assets. However, where concerns such as the risk of an adverse judgment in the coverage litigation support an early resolution of the claims against an entity and all parties can benefit from a settlement under Rule 23(b)(1)(B), we see no legal or policy reason to deny the parties this benefit. The essential basis of any settlement is to avoid the uncertainty, risks, and expense of ongoing litigation. In our case, the risks facing Fibreboard, the Insurers, and the health claimants as a result of the California coverage litigation were real and enormous. Holding that the

bankruptcy laws require the parties to wait until catastrophe befalls one or more of them as a result of the California litigation would be a denial of justice to the parties before us and unwarranted by the law.

The intervenors' argument that all 23(b)(1)(B) limited-fund actions based on the insolvency of the defendant are improper ignores the special circumstances presented by Ahearn and certifications by other courts. In light of the *Findley* and *Drexel* decisions, also from the Second Circuit, which allow 23(b)(1)(B) actions where the defendant's insolvency creates a limited fund, we decline to read *Keene* so broadly as to bar all such 23(b)(1)(B) settlements.

The plain meaning of Rule 23 also supports a finding that the insolvency of a defendant can support a 23(b)(1)(B) class action. The rule clearly does not distinguish between limited funds which assume insolvency of the defendant and limited funds such as proceeds of an insurance policy which constitute the entire fund from which plaintiffs may recover. It allows class actions whenever "the prosecution of separate actions by or against individual members of the class would create a risk of ... (B) adjudications with respect to individual members of the class which would as a practical matter ... substantially impair or impede their ability to protect their interests." Fed.R.Civ.P. 23(b)(1). Insolvency of the defendant undoubtedly impairs the ability of latecomers to receive full payment for their claims and was explicitly considered by the Advisory Committee in proposing the rule in its current form. In its Note to the 1966 Amendment to Rule 23, the Advisory Committee concludes that a limited-fund class action is appropriate in actions by creditors "when the debtor's assets are insufficient to pay all creditors' claims." Fed.R.Civ.P. advisory committee's note. This explicit reference to use of a 23(b)(1)(B)

action when the debtor is insolvent offers further support for the proposition that insolvency is an appropriate basis for a limited-fund class action.

Further, the express language of the Rule compels a flexible construction. Rule 23(b)(1)(B) authorizes class certification where there is a "risk" that separate adjudications "as a practical matter" would "substantially impair or impede" the interests of the class. The rule does not require proof to a certainty that the defendant faces insolvency.

The Bankruptcy Code allows courts to dismiss or suspend bankruptcy proceedings where superior alternatives to the code are available. See 11 U.S.C.§305(a)(1). This concession to the possibility of other proceedings to distribute an insolvent debtor's assets reveals that Congress understood that, at least some of the time, the terms and principles of the Bankruptcy Code would be circumvented by debtors and creditors who found superior methods of asset distribution. *See also* H.R.Rep. No. 95-595, 95th Cong., 1st Sess. 325 (1977); S.Rep. No. 95-989, 95th Cong., 2d Sess. 35 (1978), U.S.Code Cong. & Admin.News 1978, pp. 5787, 6281.

Ahearn presented the district court with a superior alternative to the Bankruptcy Code and did so long before any bankruptcy court would have had jurisdiction over Fibreboard's assets. Indeed, one of the most important facts of this case is that, in spite of the threat posed by future personal injury litigation, Fibreboard is currently solvent and healthy. In the short term, no trade or tort creditor has the ability or the incentive to force Fibreboard into a Chapter 11 reorganization. It is also clear that shareholders and management, who stand to lose equity and/or employment if Fibreboard enters bankruptcy proceedings, will refuse to file a voluntary petition at least until

the coverage dispute is resolved against it. That, of course, would be too late for the Global Health Claimant Class.

Even in the unlikely event that Fibreboard could be persuaded to file a voluntary bankruptcy petition, the Global Health Claimant Class would be worse off than it is under the Global Settlement Agreement. Under the Bankruptcy Code, representation for the class may not be available at all and courts that have allowed representation of future tort claimants have left them in an uncertain position that falls short of full "creditor" status.[15] Additionally, full-blown bankruptcy proceedings would bring in all of Fibreboard's other creditors and impose large transactions costs on Fibreboard that, ultimately, would come out of any distribution. See Edward I. Altman, *A Further Empirical Investigation of the Bankruptcy Cost Question*, 39 J.Fin. 1067, 1077 (1984). In stark contrast to the uncertain and weak position afforded future tort claimants under the Bankruptcy Code, the plaintiff class and its representatives in *Ahearn* had center stage and ran no risk of encountering a cram-down reorganization approved only by trade creditors and rammed through over the objections of class representatives.

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[15] *See In re Amatex Corp.*, 755 F.2d 1034, 1042 (3d Cir.1985); *In re Johns-Manville Corp.*, 36 B.R. 743 (Bankr.S.D.N.Y.1984); *In re UNR Indus.*, 29 B.R. 741, 745 n. 4 (Bankr.N.D.Ill.1983). The inability or refusal of the bankruptcy courts to place Global Health Claimant Class members on equal footing with other creditors of Fibreboard and the indeterminance of the "party in interest" categorization that the class would receive if its claims were cognizable at all in bankruptcy have been widely criticized. *See e.g.* Anne Hardiman, *Toxic Torts and Chapter 11 Reorganization: The Problem of Future Claims*, 38 Vand.L.Rev. 1369, 1395-96 (October 1985); Kevin H. Hudson, *Catch-23(b)(1)(B): The Dilemma of Using the Mandatory Class Action to Resolve the Problem of the Mass Tort Case*, 40 Emory L.J. 665, 693-95 (Spring 1991).

To the extent intervenors are arguing that certification is improper because Fibreboard fares better under the class action settlement than under a bankruptcy proceeding, we find their focus misplaced. The inquiry instead should be whether the class is better served by avoiding impairment of their interests. Fibreboard is clearly acting in its own interest in consummating the Global Settlement Agreement and thereby avoiding future insolvency. But the Global Settlement Agreement also serves the interests of the Global Health Claimant Class. Early settlement allows the class to recover far more as a group than it could if it was forced to wait until Fibreboard enters bankruptcy on its own and encounters the high transaction costs of insolvency. *See* Mark J. Roe, *Bankruptcy and Mass Tort*, 84 Colum.L.Rev. 846, 851-64, 905-17 (1984) (advocating early reorganizations because they avoid the waste of insolvency and distribute more to victims, but noting that no one with the ability to push the mass tortfeasor into an early reorganization has the incentive to do so). Precisely because it avoids the enormous transactions costs of litigation and insolvency, the Global Settlement Agreement can offer a deal from which all parties gain. Members of the Global Health Claimant Class receive more money in payment for their injuries and Fibreboard's shareholders keep their stake in a viable entity. The only loser under the Global Settlement Agreement is the asbestos litigation industry.

For all of these reasons, we find that the district court's decision to certify *Ahearn* as a 23(b)(1)(B) class action is an appropriate interpretation of Rule 23 that does not conflict with the Bankruptcy Code and upholds the principles of equity and fairness.

2. Jurisdictional and due process considerations in 23(b)(1)(b) class actions

The intervenors next argue that the district court cannot exercise jurisdiction over class members who do not have minimum contacts with the Eastern District of Texas and that due process requires that Global Health Claimant Class members be allowed to opt out of the class. Both of these arguments are based on language from the Supreme Court decision *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). In *Shutts*, the Supreme Court held that a Kansas state court could bind absent plaintiff members of the class in a "common question" class action brought under a state rule virtually identical to 23(b)(3) only if the plaintiffs were provided with "minimal procedural due process protection," including the right to opt out. *Id.* at 811-12, 105 S.Ct. at 2974. However, the Court specifically limited its holding to class actions which seek to bind

> *known* plaintiffs concerning claims wholly or predominantly for money judgments. We intimate no view concerning other types of class actions such as those seeking equitable relief.

Id. at 811 n. 3, 105 S.Ct. at 2974 n. 3 (emphasis added).

The limitation of *Shutts* to claims of known plaintiffs that are predominantly for money damages forecloses application of its holding to 23(b)(1)(B) actions which have always been equitable and often involve unknown plaintiffs. See Newberg & Conte, 1 *Newberg on Class Actions* §1.18. Class actions date back to the English common law where chancery courts used bills of peace to bind entire classes. Chafee, *Bills of Peace with Multiple Parties*, 45 Harv.L.Rev. 1297 (1932). The traditional limited-fund class action is an equitable and unitary disposition

of a fund too small to satisfy all claims. *See* Fed.R.Civ.P. 23 advisory committee's note. Unitary adjudication of a limited fund is crucial because allowing plaintiffs to sue individually would make the litigation "an unseemly race to the courtroom door with monetary prizes for a few winners and worthless judgments for the rest." *Coburn v. 4-R Corp.*, 77 F.R.D. 43, 45 (E.D.Ky.1977). Limited-fund class actions effect a pro-rata reduction of all claims in order to treat all claimants fairly. Thus, they sound in equity even though the relief they provide necessarily affects the amount of money damages that claimants can ultimately receive. *In re Joint Eastern & Southern Dist. Asbestos Litigation (Findley)*, 78 F.3d 764, 776-77 (2d Cir.1996); Newberg and Conte, 1 *Newberg on Class Actions* §1.18.

Due process standards for suits seeking equitable relief are set forth in *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940) where the Supreme Court stated:

> this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it.

Id. at 42, 61 S.Ct. at 118. *See also Shutts*, 472 U.S. at 808, 105 S.Ct. at 2972-73 (citing *Hansberry* in its description of due process requirements for traditional class actions). The rule that adequate representation is all that due process requires for the traditional mandatory class action in equity was not challenged by Shutts. Subsequent decisions have made it clear that, consistent with due process, absent parties can be bound by a judgment where they were adequately represented in a prior

action. *Martin v. Wilks*, 490 U.S. 755, 762 n. 2, 109 S.Ct. 2180, 2184 n. 2, 104 L.Ed.2d 835 (citing *Hansberry* and Fed.R.Civ.P. 23). Actions under Rule 23(b)(1)(B) are precisely the type of limited circumstances noted by *Martin* where "equitable circumstances dictate the need for a unitary adjudication regardless of the individual consent of the parties affected." Newberg and Conte, 1 *Newberg on Class Actions* §1.22 at 1-51. As a result, due process requires only that all parties bound by the Global Settlement Agreement were adequately represented. We have already concluded that they were.[16] The intervenors object that some members of the class may not have minimum contacts with the Eastern District of Texas and have not otherwise consented to the district court's jurisdiction. They also claim that the Global Settlement Agreement is without authority to release future claims that have not yet accrued. These objections again ignore the equitable nature of this action.

Due process requires adequate representation in a 23(b)(1)(B) case but, as Shutts expressly cautioned, minimum contacts or consent to jurisdiction are not necessary in equitable class actions. Newberg and Conte, 1 *Newberg on Class Actions* ,§1.20 ("Minimum Contacts Jurisdiction Not Required for Members of Equitable Class Suits") and§1.21 ("Opt-Out Rights or Implied Consent of Members Not Required for Jurisdictional

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[16]Opt-out class actions were unheard of before the 1966 amendments to the Federal Rules of Civil Procedure created the Rule 23(b)(3) opt-out class action. The intervenors would have us read *Shutts* to mean that all class actions involving money claims under Rule 23(b)(1) or (2) are unconstitutional. If the Supreme Court had intended to so hold, it surely would have been more explicit given the ancient history of the mandatory class action, over a hundred years of precedent upholding the constitutionality of such classes, the relatively recent development of the "opt-out" class action, and the strong presumption that the Federal Rules of Civil Procedure are constitutional.

Due Process in Equitable Class Suits"). It is also well settled that a unitary adjudication of a limited fund binds future, contingent, and unknown claimants who, by definition, could not give consent to jurisdiction. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

Rule 23(b)(1)(B) actions closely resemble actions for interpleader, or for the accounting of a trustee. *See Mullane*, 339 U.S. at 311-13, 70 S.Ct. at 655- 57; *In re Joint Eastern and Southern Dist. Asbestos Litigation (Findley)*, 878 F.Supp. 473, 478, 562 (E. & S.D.N.Y.1995); *In re Joint Eastern and Southern Dist. Asbestos Litigation (Eagle-Picher)*, 134 F.R.D. 32, 38 (E. & S.D.N.Y.1990). *Cf. In re Federal Skywalk Cases*, 680 F.2d 1175, 1182-83 (8th Cir.1982). This is because all claimants will recover from the fund or not at all. This view of a limited-fund class action as similar to an action in rem makes particular sense because, although limited-fund actions often involve unknown or unavailable claimants who cannot expressly consent to jurisdiction, the court in such an action has before it for disposition all the assets in which class members could claim an interest. See e.g., *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir.1992); *In re Joint Eastern and Southern Dist. Asbestos Litigation (Eagle-Picher)*, 134 F.R.D. 32, 38 (E. & S.D.N.Y.1990); *Coburn v. 4-R Corp.*, 77 F.R.D. 43 (E.D.Ky.1977). The court can appropriately adjudicate all claims against the fund because of its jurisdiction over the fund and the fact that all potential claimants are adequately represented before it. *Smith v. Swormstedt*, 57 U.S. (16 Howard) 288, 302, 14 L.Ed. 942 (1853).

Finally, the intervenors complain that the Global Settlement Agreement purports to release claims which do not present "a case or controversy." This misconstrues the nature

of the settlement which does not purport to make any determination of the validity or amount of individual personal injury claims against Fibreboard. What the settlement does is address the immediate and important controversy of whether future claimants will be able to receive compensation for their injuries before Fibreboard runs out of money. It resolves this controversy by settling the insurance coverage litigation, capping the amount recovered by individual plaintiffs at $500,000, prohibiting punitive damage awards, and limiting the amount that the Global Trust can pay out in any given year. These provisions are designed to ensure that latecomers do not find their claims impaired because the winners of the race to the courthouse have claimed all of Fibreboard's assets in the early rounds of individual litigation. The argument that plaintiffs who have already been exposed to asbestos have no justiciable interest in ensuring that funds remain available to compensate them when they contract asbestos-related diseases is not supportable and has been widely rejected. *See In re Johns-Manville Corp.*, 36 B.R. 743, 749 (Bankr.S.D.N.Y.1984); *Carlough v. Amchem Products, Inc.*, 10 F.3d 189, 196 n. 4 (3d Cir.1993). The intervenors' objection is meritless.

The district court properly found that Fibreboard is a limited fund which will be depleted to the detriment of latecomers if claims are litigated on an individual basis. Due process requires that class members in Ahearn, an equitable class action for a pro-rata distribution of a limited fund, receive adequate representation by class representatives with similar interests. The district court did not abuse its discretion in finding that these requirements were met and certifying this suit as a Rule 23(b)(1)(B) class action.

C. Other Objections

1. "Friendly" suit

The intervenors assert that *Ahearn* was a collusive or "friendly" suit in contravention of the "case or controversy" requirement of Article III in the Constitution. Specifically, the intervenors allege that (1) there was no real conflict between the parties because the complaint and settlement were filed the same day and class representatives never intended to litigate the claims alleged in the complaint, and (2) the defendants handpicked the plaintiffs' attorneys. These arguments fail because they conflict with relevant caselaw and do not address the district court's findings of fact regarding the non- collusive nature of the settlement negotiations. The intervenors also ignore the adversarial positions which the parties occupied before settlement negotiations and the positions to which they will return if the settlement is not approved.

A "case or controversy" under Article III requires that the parties be truly adverse. *United States v. Johnson*, 319 U.S. 302, 63 S.Ct. 1075, 87 L.Ed. 1413 (1943). This requires a continuing controversy, *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 2334, 45 L.Ed.2d 272 (1975), and an "honest and actual antagonistic assertion of rights." *Johnson*, 319 U.S. at 305, 63 S.Ct. at 1076 (quoting *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345, 12 S.Ct. 400, 402, 36 L.Ed. 176 (1892)).

The parties in *Ahearn* filed their proposed settlement agreement on the same day as the plaintiff class filed its complaint so they clearly did not intend to litigate the complaint. However, this does not change the adversarial nature of the disputes which the settlement resolves and does not contradict

the district court's finding that settlement negotiations were heated, difficult and conducted at arm's length. The intervenors are apparently asking us to hold that the suit is either moot or collusive simply because it was filed at the same time as a settlement requiring court approval. Neither of these conclusions is supportable.

The Supreme Court has stated that the existence of a proposed settlement does not render an action moot where judicial approval of the settlement is required before the settlement will bind the parties. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 371 n. 10, 102 S.Ct. 1114, 1120 n. 10, 71 L.Ed.2d 214 (1982). *Ahearn* was a class action that could not be settled without court approval so the parties' agreement to settle the case did not make it moot.

The other finding suggested by the intervenors, that the suit is collusive simply because the parties have resolved their differences and seek only the judicial approval required by Rule 23(e), is equally unsupportable and has also been rejected. See *Carlough v. Amchem Products*, 10 F.3d 189, 201 (3d Cir.1993) (adopting the reasoning of the district court's October 6, 1993 opinion in *Carlough v. Amchem Products, Inc.*, 834 F.Supp. 1437, 1465 (E.D.Penn.1993)); *In re Joint Eastern and Southern District Asbestos Litigation (Findley)*, 982 F.2d 721, 728 (2d Cir.1992) (complaint and settlement filed the same day); *S.E.C. v. Randolph*, 736 F.2d 525 (9th Cir.1984) (controversy exists even though settlement and complaint were filed the same day).

The district court found that the *Ahearn* complaint and proposed settlement were not collusive. The intervenors' assertions to the contrary have no support in the record. The district court found that the negotiation process was slow,

contentious and fraught with disagreements on serious issues. Its exhaustive findings of fact detail the parties' initial positions and their slow movement toward a settlement that offers a fair compromise of their various claims.

The complaint that Fibreboard handpicked the plaintiffs' attorneys is equally without merit and tells only part of the story. The record shows that Fibreboard did approach the attorneys to negotiate a global settlement but the intervenors fail to include important details such as (1) the plaintiffs' lawyers involved in the negotiations have extensive experience in asbestos litigation, and (2) the district court found that the plaintiffs' lawyers vigorously represented their clients' position. We have already concluded that the Global Health Claimant Class was adequately represented by qualified attorneys. The fact that Fibreboard initiated negotiations with a group of highly experienced, top-notch plaintiffs' attorneys in order to craft a global settlement suggests that Fibreboard wanted a fair settlement that a court was likely to approve.

2. Recusal of Judge Parker

The Flanagan intervenors appeal from Judge Steger's order in the district court denying their motion to recuse Judge Parker. They argue that Judge Parker should not have mediated the settlement and then conducted a fairness hearing on the same settlement. We review Judge Steger's decision for abuse of discretion. *In re Hipp*, 5 F.3d 109, 116 (5th Cir.1993).

A judge must disqualify himself under §455 if his impartiality "might reasonably be questioned." 28 U.S.C. §455. The standard for determining impartiality depends on the source of the judge's alleged prejudice. To the extent that a judge has become biased due to facts he has learned during a judicial

proceeding, he must recuse himself only if fair judgment would be impossible. *Liteky v. United States*, 510 U.S. 540, ----, 114 S.Ct. 1147, 1157, 127 L.Ed.2d 474 (1994). If the alleged partiality stems from a source other than a judicial proceeding, a judge must recuse himself if "a reasonable and objective person, knowing all of the facts, would harbor doubts concerning the judge's partiality." *United States v. Jordan*, 49 F.3d 152, 155 (5th Cir.1995).

Judge Parker's role in the negotiating process was insubstantial and stemmed from three cases filed in his court. His actions were limited to appointing Judge Patrick E. Higginbotham of this court as a settlement facilitator, appointing class counsel for the Global Health Claimant Class at the recommendation of Judge Higginbotham, receiving regular reports of the negotiations and mediating the global settlement negotiations personally for part of one evening. After the parties agreed to a settlement, Judge Parker held an extensive fairness hearing and appointed an independent guardian ad litem to report on the fairness of the settlement to the futures class.

Judge Steger found that "[o]n the basis of the entire record and taking all of Mr. Jaques' allegations as true, ... no reasonable person would conclude that Judge Parker is biased and no reasonable person would harbor doubts about his impartiality."[17] Our review of the record confirms that Judge

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[17]The district court also rejected the intervenors' motion under 28 U.S.C. §144. This statute requires that a party submit an affidavit alleging facts that, if true, would convince a reasonable person that bias exists. However, "[a] court may not grant relief under §144 if a party's counsel instead of the party executes an affidavit alleging personal bias or prejudice." *Pomeroy v. Merritt Plaza Nursing Home, Inc.*, 760 F.2d 654, 658-59 (5th Cir.1985) (citations omitted). The only affidavit before the district court was submitted by counsel

(continued...)

Parker carefully avoided any appearance of impropriety. The district court did not abuse its discretion in denying the motion to recuse.

3. Plant Insulation Company

Plant Insulation Company, a member of the Global Third-Party Claimant Class, argues that its due process rights were violated because it was not allowed to opt out of that class. Plant did not attempt to intervene in the proceeding before the district court so it has no standing to appeal the district court's ruling. The Fifth Circuit has held that "non-named class members do not have standing to appeal the final judgment in a class action...." *Walker v. City of Mesquite*, 858 F.2d 1071, 1074 (5th Cir.1988). As a result, "we have no jurisdiction to consider an appeal by a class member who has not attempted to intervene as a named party." *Loran v. Furr's/Bishop's Inc.*, 988 F.2d 554 (5th Cir.1993). *See also, Edwards v. City of Houston*, 78 F.3d 983 (5th Cir.1996) (en banc) (unions had no standing to appeal the court's final judgment because they never became named parties or intervenors in the suit). Accordingly we dismiss Plant's appeal for lack of standing.[18]

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[17](...continued)
for the Flanagan intervenors, Leonard Jacques, and therefore did not qualify for relief under §144. The district court's error in considering the recusal motion under §144 was harmless in any event because the court properly concluded that even if the facts in the affidavit were assumed true, a reasonable person would find that no bias exists.

[18]Two other would-be appellants also lack standing under this rule. However, we need not dismiss their appeals for lack of standing because they are dismissed on other grounds. On March 25, 1996, Jeffrey Mack Chapin filed
(continued...)

4. Other objections of the Flanagan intervenors

The Flanagan intervenors raise several more objections common to *Ahearn* and *Rudd*. They argue that merchant mariners are differently situated from other members of the Global Health Claimant Class because of differences between admiralty law and the tort law of some states. This argument ignores the fact that the Global Settlement Agreement allows claimants the same rights they would receive in the tort system (limiting only the amount of total damages and punitive damages). Admiralty law will provide the backdrop for any maritime plaintiff's settlement because that law will govern the trials of maritime plaintiffs who choose the back-end opt-out provision.

Finally, the Flanagan intervenors claim that the district court improperly used defendant classes. They argue that defendant classes are only appropriate in cases where defendants are guilty of egregious misconduct. This argument has no support in the language of Rule 23 and is contrary to a wide range of cases where courts have certified defendant classes without requiring a "widespread pattern of wrongful conduct." *See e.g., Blake v. Arnett*, 663 F.2d 906, 911-13 (9th Cir.1981) (defendant class of Yurok Indians on counterclaims seeking declaration eliminating alleged Indian treaty rights in land held by lumber and mining company); *Board of Regents of*

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[18](...continued)
notices of appeal complaining of orders entered in *Ahearn* and *Rudd*. These notices of appeal which were consolidated into *Ahearn* and *Rudd* were untimely and are therefore dismissed. Kenneth Smith has also filed notices of appeal complaining of the orders in *Ahearn* and *Rudd*. Smith's notices of appeal have also been consolidated into *Ahearn* and *Rudd* and are dismissed due to Smith's failure to pay the docketing fee and failure to file an appellate brief.

University of Nebraska v. Dawes, 522 F.2d 380, 381 (8th Cir.1975) *cert. denied*, 424 U.S. 914, 96 S.Ct. 1112, 47 L.Ed.2d 318 (1976) (defendant class of employees allegedly discriminated against by plaintiffs); *Garneau v. City of Seattle*, 897 F.Supp. 1318, 1320 (W.D.Wa.1995) (defendant class of low-income tenants seeking relocation assistance from plaintiffs); *Houston Chapter of the Int'l Ass'n of Black Professional Firefighters v. Houston*, 1991 WL 340296, at * 3, *28 (S.D.Tex. May 3, 1991) (defendant class of present and future non-black, non-Hispanic firefighters who will be eligible for certain ranks in the Houston Fire Department).[19]

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[19]The Flanagan intervenors also argue that claims which Fibreboard already knew about (those of Mr. Jaques' clients) cannot be "future claims" simply because they were not filed before the settlement was reached. This objection is asserted without any basis in law and fails to explain how claims which have not yet been filed could be anything other than "future claims" in the eyes of a court.

The Flanagan intervenors also claim that they are appealing the judgment entered in *Ahearn* which approves the Trilateral Settlement Agreement as a fair settlement of the coverage litigation between Fibreboard and the Insurers. However, Flanagan failed to raise this issue in his initial brief and has not demonstrated that he has standing to challenge this judgment. On appeal, this court will not reach issues not raised in the initial brief. *United Paperworkers Intern. U. v. Champion Intern.*, 908 F.2d 1252, 1255 (5th Cir.1990). Additionally, Flanagan has failed to demonstrate (or make any argument) that he is a proper party to appeal the judgment approving the fairness of the settlement of the coverage litigation between Fibreboard and the Insurers. *See Rohm & Hass Tex. v. Ortiz Bros. Insulation*, 32 F.3d 205 (5th Cir.1994).

III. RUDD

In addition to the claims addressed above, the Flanagan intervenors make several objections specific only to *Rudd*.[20]

A. Fibreboard as an Indispensable Party

The Flanagan intervenors argue that the *Rudd* action must be dismissed for lack of an indispensable party, Fibreboard.[21] Although they failed to raise this issue in the district court, we may still consider it on appeal. *United States v. Sabine Shell, Inc.*, 674 F.2d 480, 482 (5th Cir.1982). However, "failure to raise the issue of joinder until this appeal mitigates against a finding in their favor." *Id.* at 483. We agree with the Ninth Circuit that "when the judgment appealed from does not in a practical sense prejudicially affect the interests of the absent parties, and those who are parties have failed to

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[20]The Flanagan intervenors argue that *Rudd* was inappropriately certified as a 23(b)(1)(B) class. We do not consider the merits of this argument because the district court found, and we agree, that the defendant class in *Rudd* could also be certified under 23(b)(2). None of the intervenors appeals the propriety of certification under this provision.

[21]Rule 19(b) requires a district court deciding the question of indispensability to consider:

> first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.
>
> Fed.Rule Civ.Proc. 19(b).

object to non-joinder in the trial court, the reviewing court will not dismiss an otherwise valid judgment." *Sierra Club v. Hathaway*, 579 F.2d 1162, 1166 (9th Cir.1978), *cited with approval in McCulloch v. Glasgow*, 620 F.2d 47, 51 (5th Cir.1980). *See also Judwin Properties Inc. v. United States Fire Insurance Co.*, 973 F.2d 432, 434 (5th Cir.1992) and *Sabine Shell*, 674 F.2d at 483.

Both the Trilateral Health Claimant Class and the Trilateral Third- Party Claimant Class agreed to a consent judgment sought by the Insurers declaring approval of the Trilateral Settlement Agreement and the release of the Insurers. Because Fibreboard has already consented to entry of a similar release of the Insurers in *Ahearn*, the *Rudd* judgment does not prejudicially affect Fibreboard. Thus, *Rudd* should not be dismissed for want of an indispensable party.

B. Justiciability of the *Rudd* Claim

The Flanagan intervenors argue that the Rudd complaint fails to state a cause of action or a "case or controversy." The Insurers in *Rudd* seek declaratory and injunctive relief determining that (1) the Trilateral Settlement Agreement is fair, reasonable, and negotiated at arm's length in good faith; (2) the defendant classes approve of the Trilateral Settlement Agreement and the release of the Insurers; and (3) the defendant classes be enjoined from asserting future claims against the Insurers.

The Declaratory Judgment Act does not expand the jurisdiction of the federal courts. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72, 70 S.Ct. 876, 878-79, 94 L.Ed. 1194 (1950). Similarly, it does not create substantive rights; it is only a procedural device that enhances the remedies

available in the adjudication of a case or controversy. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240, 57 S.Ct. 461, 463-64, 81 L.Ed. 617 (1937).

A justiciable case or controversy exists as long as the court's ruling will affect "tangible legal rights." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 619, 109 S.Ct. 2037, 2046-47, 104 L.Ed.2d 696 (1989). In *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 61 S.Ct. 510, 85 L.Ed. 826 (1941), the Supreme Court stated that "[b]asically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Id. at 273, 61 S.Ct. at 512.

In *Rudd*, the Insurers seek a declaratory judgment that because the Trilateral Settlement Agreement is fair and negotiated in good faith, it cuts off all rights of both Trilateral Health Claimants and Trilateral Third-party Claimants to payments under the policies. The Insurers were justifiably concerned that after they spend $2 billion on the Trilateral Settlement with Fibreboard, the settlement could be challenged by asbestos victims and third-party claimants, particularly if Fibreboard becomes insolvent. The Insurers in *Rudd* sought to cut off this potential challenge by obtaining the declaratory and injunctive relief described above.

Many states recognize that a tort victim injured during the policy period has sufficient legal interest in that policy to attack subsequent changes that affect the right to recover--i.e., reformation, cancellation, or settlement of the policy. *See, e.g.*,

Maryland Casualty Co., 312 U.S. at 273-74, 61 S.Ct. at 512-13 (a tort victim has a potential financial interest in the insurer's insurance policy, and the impairment of this interest is an injury that will support standing under Article III); *Bankers Trust Co. v. Old Republic Insurance Co*, 959 F.2d 677, 682 (7th Cir.1992) ("the victim of an insured's tort, even though he is not a third-party beneficiary of his insurer's insurance policy, has a legally protected interest in that policy before he has reduced his tort claim to judgment"). Some states even require the injured party to be included in any negotiations of policy changes that will affect their rights. *See e.g., Smith & Wesson v. Birmingham Fire Ins. Co.*, 123 A.D.2d 135, 510 N.Y.S.2d 606, 608 (1st Dept.1987); *Maryland Cas. Co. v. Wilson*, 6 Ariz.App. 470, 433 P.2d 650, 652 (1967); *Shapiro v. Republic Indem. Co.*, 52 Cal.2d 437, 341 P.2d 289, 290 (1959); *Womack v. Allstate Ins. Co.*, 156 Tex. 467, 296 S.W.2d 233, 236 (1956). Thus, the Insurers faced a substantial threat of collateral attacks from members of both the Trilateral Health Claimant Class and the Trilateral Third-party Claimant Class asserting that the Trilateral Settlement was unfair or fraudulent. A true controversy existed.

The Flanagan intervenors also argue that the Trilateral Settlement Agreement is effective only if the *Ahearn* settlement is rejected. Flanagan argues that this contingency precludes a finding that *Rudd* is an adjudication of a "present right upon established facts." *Brown & Root, Inc. v. Big Rock Corp.*, 383 F.2d 662, 665 (5th Cir.1967).

The Trilateral Settlement Agreement contains provisions that become operative regardless of whether the Global Settlement Agreement is ultimately approved or disapproved; for example, the parties agree in the Trilateral Settlement Agreement to compromise all Fibreboard's claims under the insurance policies not previously released, including claims for

property damages. The Global Settlement Agreement only refers to personal injury claims filed against Fibreboard after August 27, 1993. Therefore, the effectiveness of the Trilateral Settlement Agreement is not wholly contingent on the outcome in *Ahearn*.

Moreover, the case would be ripe even if the effectiveness of the Trilateral Settlement Agreement were wholly contingent upon the disapproval of the Global Settlement Agreement. In *Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138 (5th Cir.1993), we found a case would be ripe for adjudication notwithstanding the existence of some contingency to the claim if either (1) there is "a substantial possibility" that the contingency will occur, or (2) the only questions being presented "are purely legal ones." *Id.* at 1154. We found judicial resolution of contingent claims is consistent with the purpose of the Declaratory Judgment Act which is "to settle actual controversies before they ripen into violations of law or breach of some contractual duty." *Id.* (quoting Hardware *Mutual Casualty Co. v. Schantz*, 178 F.2d 779, 780 (5th Cir.1949)).

In *Rudd*, the contingency that the global settlement might not receive court approval or might be successfully attacked was a substantial possibility; the global settlement was an innovative approach to unique circumstances. The parties to *Ahearn* had no assurance that a court would accept this settlement which is the reason the *Ahearn* plaintiffs insisted on a back-up agreement to settle the coverage issue. Thus, we agree with the district court that the *Rudd* complaint presented a justiciable claim.

CONCLUSION

Although appellants' arguments challenging the approval of the global settlement are not insubstantial, on the unique facts presented here they do not carry the day. The global settlement was driven by insurance coverage litigation between Fibreboard and the Insurers which would have been catastrophic for whomever was on the losing side. None of the parties was prepared to take the enormous risk inherent in that litigation. The global settlement offers all sides the best solution possible by eliminating costly disputes between Fibreboard, its insurers, and asbestos claimants and ensuring an equitable distribution to asbestos claimants. The $1.5 billion global settlement was a major accomplishment by all parties concerned and no one seriously challenges its adequacy or the desirability of avoiding another bankruptcy of a vigorous American company.

For the reasons stated above, we conclude that in this case none of the legal impediments argued by appellants precluded the district court from approving the global or trilateral settlements. Both settlements were legally sound resolutions of serious disagreements. The judgment of the district court is AFFIRMED.

APPENDIX D

JERRY E. SMITH, Circuit Judge, dissenting:

I. Introduction.

The district court and the majority undoubtedly are driven by a commendable desire to resolve voluminous personal injury claims against an otherwise strong American company and to ensure an orderly transfer of funds from the company's insurers to its victims. In order to accomplish this result, however, they have extinguished claims over which they have no jurisdiction and deprived thousands of asbestos victims of basic constitutional rights. The result is the first no-opt-out, mass-tort, settlement-only, futures-only class action ever attempted or approved.

Ironically, the willingness to jettison centuries-old legal precepts hurts the very victims they intend to help: The settlement forces asbestos victims to surrender their claims in exchange for a meager $10 million of Fibreboard's $225-250 million net worth. They also benefit from Fibreboard's settlement with its insurers, but Fibreboard and the insurers had powerful incentives to settle that dispute by themselves; in fact, they did so for $2 billion.

There was no need even to involve the class in those negotiations, much less to sacrifice its interests. "Thus, the class members appear to have traded Fibreboard's liability for nothing to which they did not already have a right."[1]

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[1] John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM.L.REV. 1343, 1420 (1995).

On the other hand, the district court and the majority have bailed Fibreboard's shareholders out of a mammoth liability and awarded $43.7 million to class counsel. This suit was supposedly brought on behalf of Fibreboard's victims, but of the four entities directly affected by the settlement-- Fibreboard, class attorneys, courts, and asbestos victims--the victims were the only entity absent from the bargaining table. Perhaps for that reason, they also were the only losers.

How could well-intentioned judges sanction--indeed, compel--such an untoward result? Apparently this is simply a case of judges--both trial and appellate--trying too hard to solve the vexing problems posed by unending asbestos litigation. Having certified at least two other high-profile asbestos class actions,[2] then-Chief District Judge Parker was acutely aware of the problems posed by asbestos litigation. In the end, he appears to have become too close to both the overall problem and the instant settlement to continue to act in a judicial capacity in this case.[3]

When Fibreboard and class counsel announced at a court hearing that they had reached a settlement, Chief Judge Parker referred to "extensive negotiations between counsel that the Court has participated in." Also at that time, and long before

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[2]See *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir.1990) (granting writ of mandamus); *Jenkins v. Raymark Indus.*, 782 F.2d 468 (5th Cir.1986) (affirming certification).

[3]For example, certain of the appellants make much of a gathering Chief Judge Parker arranged at his house during which, *allegedly*, counsel-- especially the insurers'--were hounded into settling. I reach no conclusion regarding the details of this episode except that it demonstrates both that the proceedings in this case were unusual and that Chief Judge Parker was aggressively involved in the settlement.

the fairness hearing, he said, "We will trust in the scholarship, the good judgment and common sense of the ... courts of appeal in the event this comes to their attention." In short, Chief Judge Parker tried his best to solve a perplexing problem, and it is our task to figure out whether that solution is legally sustainable.

There are two primary problems: (1) Fibreboard, class counsel, and Fibreboard's other creditors have combined to profit at the expense of absent class members; and (2) this case is an affront to the integrity of the judicial system. As we observed when reversing Chief Judge Parker's certification of another class action against Fibreboard: "The Judicial Branch can offer the trial of lawsuits. It has no power or competence to do more." *Fibreboard*, 893 F.2d at 712.

A. Importance and Uniqueness.

This case is extraordinarily important. Prior to the filing of this suit, no one had ever attempted a no-opt-out, mass-tort, settlement-only, futures-only class action. Ever since the district court's certification order, however, corporate America has been "anxiously awaiting" a decision in this case. Richard B. Schmitt, *The Deal Makers: Some Firms Embrace the Widely Dreaded Class-Action Lawsuit*, WALL ST.J., July 18, 1996, at A1. The majority's unequivocal approval of Fibreboard's litigation strategy undoubtedly will lead "other financially threatened companies throughout the nation [to] utilize it as a road map for sheltering their assets and improperly restricting the rights of their present and future victims." Amicus Br. of Trial Lawyers for Public Justice at 2-3.

Thus, the majority's reliance upon the "unique facts" of this case, see maj. op. at 993, is ironic: The unique fact of the insurance dispute is simply irrelevant, and the other unique

facts--a corporate defendant's hand-picking class counsel, cutting a side deal, reaching a "global settlement" affecting only "future" plaintiffs, and choosing a sympathetic judge to approve the settlement--likely will become far too common now that the majority has approved of them. "[W]hat was meant to provide a remedy for those who would otherwise lack one, enabling them to pool their voices and finances, will become a device to take away remedies from those who could otherwise invoke them." John Leubsdorf, *Co-Opting the Class Action*, 80 CORNELL L.REV. 1222, 1223 (1995).

B. The Need for Procedural Protections.

Two primary errors led the district court and the majority astray.

These are, first, underestimating the importance of jurisdictional and procedural protections for absent class members, and second, departing from the judiciary's exclusive area of authority and competence--the resolution of lawsuits.

We must keep in mind that it was the *defendant*--Fibreboard--who selected the class that was to "sue" it and the class action lawyers who were to do the dirty work. Fibreboard hand-picked a class that was uniquely vulnerable to exploitation, class counsel who were widely reported to have sold out a similar class, and a court with a reputation for favoring a global settlement. Class counsel then cut a side deal with Fibreboard before agreeing to the class settlement, and the district judge presided at the fairness hearing on the very settlement he had helped to craft.

The settlement extinguishes claims of people over whom we lack jurisdiction, some of whom have not yet been injured

and others of whom have not even been born. It also prevents such future claimants from opting out, because of a supposed need to divide a limited fund among a large number of claimants, but it grants automatic opt-outs to all those who already had filed suit. Coincidentally or not, this gerrymandered class definition includes those most vulnerable to abuse while excluding those most likely to intervene, to monitor class counsel, and to oppose the settlement.

It is fair to question for whom class counsel really worked. Fibreboard picked them, the district court approved them, the insurers paid them, and in exchange, they bailed out Fibreboard's shareholders and relieved district courts of potentially thousands of cases--at the expense of the absent asbestos victims whom class counsel purportedly represent.

> If all that was at stake for individual class members was some nominal compensation for having been charged an extra five cents on a bag of potato chips, one might not be too concerned with how the courts enforced class counsel's duties to these people. But often much more is at stake, such as whether a plaintiff will recover for a fatal illness caused by a defective product, and if so, how much. Today, such a person may have her rights adjudicated by a court without actual notice of the action and before she even knows she has been injured.
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> Fantastic as this may seem ..., it is true.[4]

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[4]Susan P. Koniak, *Through the Looking Glass of Ethics and the*

(continued...)

But it need not be. Even rudimentary constitutional protections--such as according absent class members adequate representation and adjudicating only their presently-existing, legally cognizable injuries--would have prevented Fibreboard from perpetuating this unfortunate miscarriage of justice.

C. Legislated Tort Reform.

The district court legislated a bold and novel tort reform proposal thinly disguised as the settlement of a lawsuit. Of course, there never was a lawsuit: Fibreboard and its hand-picked class counsel agreed to file a suit only if they already had settled it. Thus, Chief Judge Parker began his opinion by stating, "This action was filed to obtain judicial approval of a class settlement." *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505, 507 (E.D.Tex.1995).

The class complaint alleges exposure-only claims for which the settlement provides *no* compensation. Class counsel even conceded that, as a matter of practice, they do not pursue such claims on behalf of their own clients; instead, they wait and file suit after a plaintiff actually has suffered an injury. The *only* reason to include those claims in the complaint was to manufacture jurisdiction over class members who have not yet

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(...continued)
Wrong with Rights We Find There, 9 GEO. J. LEGAL ETHICS 1, 13 (1995). The *Ahearn* and *Georgine* settlements have received significant attention in the academic literature, most of it extremely negative. *See, e.g.*, Coffee, *supra* note 1, at 1393-1404; Roger C. Crampton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 CORNELL L.REV. 811, 825-35 (1995); Susan P. Koniak, *Fea-ting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L.REV. 1045 (1995); Richard L. Marcus, *They Can't Do That, Can They? Tort Reform via Rule 23*, 80 CORNELL L.REV. 858, 898-900 (1995).

manifested symptoms of asbestosis or otherwise suffered a legally cognizable injury. Even that attempt to trump up jurisdiction should fail, however, as many states do not recognize an exposure-only cause of action.

Moreover, the settlement does not resolve the rights of individual class members. The only genuinely judicial aspect of approving the settlement is the release of Fibreboard from liability to the class, or more specifically, the transfer, from Fibreboard's shareholders to its victims, of the risk that Fibreboard's insurance assets are inadequate.

The remainder of the settlement is purely legislative: Class members' causes of action are repealed in favor of the equivalent of a workers' compensation regime.[5] The Association of Trial Lawyers of America summed up this point nicely in an amicus brief opposing the settlement: "The alchemy of the [instant] settlement ... had the effect of transforming the common law damage claims of asbestos victims, which were

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[5]The purported "back-end opt-out right" likely will prove to be no right at all. Before he may even file a lawsuit, a victim must (1) file a claim with the trust and wait for it to evaluate his claim; (2) engage in settlement discussions; (3) proceed to mediation; and (4) participate in non-binding arbitration.

> Even after securing a court judgment in his favor, the claimant may not enforce that judgment; instead, he must accept installment payments over a number of years. His recovery is capped at a pre-set dollar amount, and he is barred from receiving punitive damages or pre- or post-judgment interest. In short, the settlement ensures that the trust can make trial an impracticable method of recovery, forcing class members to settle within the confines of the administrative procedure devised by Fibreboard and class counsel.

clearly safeguarded by the right to trial by jury, into administrative claims without that right." Amicus br. at 9.

Even if exchanging state tort law for this private, alternative dispute resolution mechanism were the boon to class members that the majority holds it out to be--and I doubt that it is, *see infra* part IX--such a policy decision is "better addressed to the representative branches--Congress and the State Legislature." Fibreboard, 893 F.2d at 712. In addition, *Fibreboard* hardly deserves more than $200 million for drafting the legislation.

"[T]raditional ways of proceeding reflect far more than habit." *Fibreboard*, 893 F.2d at 710. As judges are trained and equipped to adjudicate, not legislate, it is understandable that the courts have fallen prey to powerful special interest groups--a wealthy defendant and the class action bar--and unwittingly disserved the very victims the courts were intended to help.

D. Constructive Bankruptcy.

Nor does Fibreboard's "constructive bankruptcy" justify abridgment of absent class members' substantive state law rights. In bankruptcy, the claims of all of Fibreboard's creditors, not just its "future" personal injury victims, would be crammed-down. Permitting Fibreboard to effect a reorganization bankruptcy proceeding in the guise of a futures-only class action circumvents the detailed protections of the Bankruptcy Code for the express purpose of imposing the entire cost of the bailout on Fibreboard's most vulnerable creditors, to the betterment of its shareholders.

The Second Circuit decertified a similar settlement class for precisely that reason:

> Evasion of bankruptcy is ... not without costs or other perils.... [C]lass members in cases such as this would have no say in the conduct of the court- appointed class representatives and, unlike creditors in bankruptcy, are not able to vote on a settlement. For them, it would be "cram-down" from start to finish.

Keene Corp. v. Fiorelli (In re Joint E. & S. Dist. Asbestos Litig.), 14 F.3d 726, 732 (2d Cir.1993) (citation omitted). The amicus brief of the Trial Lawyers for Public Justice puts the point more forcefully: "[I]nstead of protecting class members from the risk that their ability to obtain relief from Fibreboard will be 'substantially impaired,' certification of the proposed settlement class here ensures that the class members' ability to obtain relief from Fibreboard will be totally *eliminated*." Amicus br. at 6.

E. Creating a Circuit Split.

Our sister circuits have rejected all other actions that came even close to attempting what Fibreboard has done here. The Ninth Circuit has squarely held that opt-out rights are available in *all* class actions seeking predominantly monetary damages, regardless of the subsection under which they were certified. *See Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir.1992), *cert. dismissed*, 511 U.S. 117, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994). Two other circuits appear to agree with the Ninth, and none has expressly disagreed. *See infra* note 16. Without even citing that authority, however, the

majority arbitrarily limits opt-out rights to actions certified under FED.R.CIV.P. 23(b)(3), *see* maj. op. at 987 n. 16, exalting an irrelevant technicality over the underlying reality and creating a circuit split in the process.

Earlier this year, the Third Circuit firmly held that class counsel cannot adequately represent both extant and latent claimants in a futures-only asbestos class action. *Georgine v. Amchem Prods.*, 83 F.3d 610, 630-31 (3d Cir.1996). The court explained that while extant claimants--those who have already incurred injuries--desire immediate, unlimited recovery from the trust, latent claimants--those who have yet to suffer an injury--desire that recovery be capped or delayed to ensure that extant claimants will not deplete the fund. *Id.*

The majority mentions *Georgine* only in a brief footnote, distinguishing it on the ground that the *Georgine* settlement provides a detailed claims resolution schedule, while the *Ahearn* settlement does not. *See* maj. op. at 976 n. 8. Class counsel still served conflicting interests, however, and postponing some distributional issues until after certification and appeal hardly makes them disappear. The majority may prefer the devil it does not know to the devil it does, but I am loath to make that decision for an entire class of people who are not even aware that we are "adjudicating" their rights.

On the other hand, the majority is correct that *Keene* is easy to distinguish, for the defendant in that action was forthright: Instead of retaining plaintiffs' counsel and having them file a complaint asserting claims they had no intention of pursuing (as occurred here), the asbestos manufacturer asked the court to oversee the negotiation of a settlement. *See Keene*, 14 F.3d at 728-29. The Second Circuit dismissed the action, finding that "it is a self-evident evasion" of the Bankruptcy

Code, "the exclusive legal system established by Congress for debtors to seek relief." *Id.* at 732. Future defendants presumably will draw one of two conclusions: Involve the court as little as possible in settlement class actions, or file in the Fifth Circuit.

In sum, the settlement fails either a customary legal analysis or a common- sense smell test. I respectfully but vehemently dissent from all but part III of the majority opinion.

II. Facts and Procedural History.

Though the background to this case is somewhat complicated, the key facts are hard to overlook. Fibreboard approached four plaintiffs' lawyers, including Ron Motley and Joe Rice, and suggested that they negotiate a "global settlement" of all of Fibreboard's asbestos liabilities. The negotiations initially failed, perhaps because of the massive scope of the undertaking.

Fibreboard then adopted a risky strategy of assigning claims against its insurers in settlement of individual suits. The danger was that these settlements arguably violated the insurance policies. Fortunately for Fibreboard, a California court approved the deals.

Then something odd happened: Fibreboard settled a large number of cases with Ness Motley--Motley and Rice's law firm--by assigning insurance assets, and brought an action in the Eastern District of Texas seeking approval of the settlement. Why would Fibreboard, a California company, roll the dice in Texas when it had already won in California? Because something important had happened in Pennsylvania.

The Judicial Panel on Multidistrict Litigation had transferred all pending asbestos cases not yet on trial to a district court in Pennsylvania. *See Georgine v. Amchem Prods.*, 83 F.3d 610, 619 (3d Cir.1996). Then-Chief Judge Robert Parker of the Eastern District of Texas wrote a letter to the transferee judge, telling him that he (the Pennsylvania judge) was "the Eisenhower of this D-Day operation" and encouraging him to prod the parties to a global settlement. *See* Coffee, *supra* note 1, at 1390.

When the plaintiffs' steering committee rejected such a proposal, twenty defendants approached a minority faction of the committee--Motley and Gene Locks--and reached a global settlement with them. *See id.* at 1391-92, 1457. Actually, they made a series of deals: a class action settlement for future asbestos victim claimants and separate settlements for the lawyers' pre- existing, individual clients.

The separate settlements were significantly more lucrative than the class one. *See id.* at 1392-93; Koniak, *Feasting, supra* note 4, at 1052. In fact, Motley received fifty percent more for his own clients than he did for those in the class. *See* Coffee, *supra* note 1, at 1397; Koniak, *Feasting, supra* note 4, at 1067. The Third Circuit rejected the settlement, finding that class counsel--including Motley--were hopelessly conflicted. *See Georgine*, 83 F.3d at 630-31.

As the *Georgine* negotiations concluded, Fibreboard and Ness Motley settled a number of cases and, as noted above, filed an action in Chief Judge Parker's court. Fibreboard thereby secured class counsel with a track record of making global settlements and a judge with a demonstrated commitment to them. Following the *Georgine* pattern, class negotiations reached an impasse over the future of Ness Motley's remaining

cases against Fibreboard. The court-appointed "Settlement Facilitator," Judge Patrick Higginbotham, then suggested that they settle those cases before attempting further negotiation of a global settlement. After concluding the Ness Motley deal--which settled the individual claims for higher-than-average amounts, contingent upon successful completion of a global settlement--Fibreboard and class counsel resumed negotiation of such a settlement.

As those negotiations drew to a close, Chief Judge Parker intervened, taking counsel to his house for a final mediation session. It appears that he was successful, for defense counsel eventually increased their offer to an amount that class counsel later accepted.

Class counsel then filed a complaint in Chief Judge Parker's court, along with motions to certify the class and approve the settlement. The judge certified the class and found that the settlement was fair. And Fibreboard's stock soared.[6]

III. The Forest for the Trees.

The majority commits two fundamental errors: first, treating justiciability, due process rights, and certification criteria as mere annoyances to be brushed aside in pursuit of what it believes to be the greater good; and second, failing to assess the aggregate effect of its restrictions on asbestos victims' due process rights.

Justiciability and certification requirements are indispensable in any class action. Justiciability looks, among

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[6]*See* Coffee, *supra* note 1, at 1402 & n. 232.

other things, to whether a person has suffered a legally cognizable injury. If an individual has not been legally injured, it is unlikely that he would receive notice of the action or realize that he is a member of the class. Even if he became aware of the action's potential effect on his legal rights, he would likely remain apathetic: Any effect on him is remote in time and contingent on the future development of a disease or other damage or injury. Thus, such class members are especially vulnerable to abuse by class counsel.

Similarly, certification criteria such as commonality, typicality, and adequacy of representation ensure that representative litigation is truly representative. If class counsel stand to gain from selling out the class or from benefiting one subgroup of claimants over another, some or all class members are deprived of a meaningful opportunity to be heard--one of the most fundamental of all due process rights.

The majority addresses each class protection device in isolation, always finding that the protection does not apply because of a legal rule developed in a different context or an historical analogy that fails to recognize the novelty of this action. Such tunnel vision obscures the fact that while a particular protection might not always be necessary, some combination of protections is. When courts remove all meaningful safeguards--as the majority does here--class members suffer dramatically.

A. The Danger Inherent in Representative Litigation.

"It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party...." *Hansberry v. Lee*, 311 U.S. 32, 40, 61

S.Ct. 115, 117, 85 L.Ed. 22 (1940). This "deep-rooted historic tradition that everyone should have his own day in court," 18 CHARLES A. WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE (hereinafter "WRIGHT & MILLER") §4449, at 417 (1981), creates the core of due process: the rights to notice, to control one's own case, and to an opportunity to be heard.

The class action device is an equitable exception to this bedrock principle. *See Hansberry*, 311 U.S. at 41, 61 S.Ct. at 117-18. Not surprisingly, such a "fundamental departure from the traditional pattern in Anglo-American litigation generates a host of problems." *Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 678 (7th Cir.1987). More bluntly, "class actions are extraordinary proceedings with extraordinary potential for abuse." *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 953 (Tex.1996).

Accordingly, the Constitution's guarantee of due process requires us to use this joinder device carefully: In exchange for losing the right to prosecute his own action, a class member must receive a variety of substitute protections. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12, 105 S.Ct. 2965, 2974-75, 86 L.Ed.2d 628 (1985); *Hansberry*, 311 U.S. at 45, 61 S.Ct. at 119-20. Though the Supreme Court has largely refrained from determining the scope of those protections, its scant jurisprudence establishes two related principles: First, the extent to which due process requires procedural protections necessarily depends upon the extent to which class members' interests are infringed;[7] and second, we must meet new uses of

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[7] See *Shutts*, 472 U.S. at 808-11, 105 S.Ct. at 2972-74 (finding that opt-out right, rather than opt-in requirement, adequately protects class members (continued...)

the device with new protections.[8] In short, the safeguards required by due process necessarily differ according to the type of action, and when confronted with a new animal, we must analyze those safeguards anew. Reliance on strained analogies to inapposite traditional actions leaves us in what one commentator has aptly labeled a "due process quandary."[9] Thus the irony: The majority eviscerates well- established due process protections because of the "unique facts" of the case, *see* maj. op. at 993, but fails to recognize that those novel facts

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[7](...continued)
in light of burdens imposed on them).

[8]*See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14, 70 S.Ct. 652, 656-57, 94 L.Ed. 865 (1950) (balancing interests of class members and efficient operation of modern investment trusts). The majority's assertion that "[t]he rule that adequate representation is all that due process requires for the traditional mandatory class action in equity was not challenged by Shutts," maj. op. at 986, is erroneous. The Hansberry court reserved judgment on what other procedures might be required, *see* 311 U.S. at 43-44, 61 S.Ct. at 118-19, and the Court later found that members of mandatory classes have an additional due process right to adequate notice, *see Mullane*, 339 U.S. at 318-19, 70 S.Ct. at 659-60. Nor did *Shutts* construe *Hansberry* so narrowly. *See Shutts*, 472 U.S. at 808-09 n. 1, 105 S.Ct. at 2972-73 n. 1 ("The holding in *Hansberry*, of course, was that petitioners in that case had not a sufficient common interest with the parties to a prior lawsuit such that a decree against those parties in the prior suit would bind the petitioners.").

[9]*See* Linda S. Mullenix, *Class Actions, Personal Jurisdiction, and Plaintiffs' Due Process: Implications for Mass Tort Litigation*, 28 U.C. DAVIS L.REV. 871, 911-12 (1995); cf. William W. Schwarzer, *Structuring Multiclaim Litigation: Should Rule 23 Be Revisited?*, 94 MICH.L.REV. 1250, 1255 (1996) (observing that appropriate accommodation of competing interests differs according to nature of class and claims).

may actually call for *enhanced*, not lessened, protections for vulnerable asbestos victims.[10]

B. Vulnerability of the Class.

This case is indeed such a new animal. The district court certified a class

> (1) including people who have not yet been injured or do not yet know that they have been injured;
> (2) excluding all present claimants;
> (3) for settlement purposes only;
> (4) in a mandatory action seeking predominately monetary damages.

Certification of futures-only actions creates a massive potential for abuse. Many putative future claimants have manifested no symptoms and do not even know they were exposed. Others are the future spouses and children of asbestos victims, most of whom either do not exist or could not possibly know that they are class members. Thus, the due process standbys--notice and an opportunity to be heard--are meaningless to countless future claimants.[11]

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[10]We need not consider the outer limits of due process in this case, however, as the district court failed to employ even basic protections such as opt-out rights and adequate representation.

[11]*See Ivy v. Diamond Shamrock Chems. Co. (In re Agent Orange Prod. Liab. Litig.)*, 996 F.2d 1425, 1435 (2d Cir.1993) (observing that "providing individual notice and opt-out rights to persons who are unaware of an injury would probably do little good"), *cert. denied*, 510 U.S. 1140, 114 S.Ct. 1125, 127 L.Ed.2d 434 and *cert. denied*, 510 U.S. 1140, 114 S.Ct. 1126, 127 L.Ed.2d 434 (1994); *see generally* Marcus, *supra* note 4, at 889 (explaining (continued...)

Moreover, future claimants are, by definition, persons who have not yet developed a sufficient interest in their claims to file suit; thus, they are likely to be passive and particularly vulnerable to exploitation.[12] Finally, courts have a rotten track record with futures-only actions: Of the two largest such actions, one is *Georgine*, and the other settlement fell apart because the parties radically underestimated the number of claimants. *See* Coffee, *supra* note 1, at 1417-18 (discussing failure of Dow Corning settlement).

These concerns are mitigated somewhat by the breadth of the "futures" class. Some members are presently injured and aware of their injuries, and some have even spoken with lawyers. While most of these claimants might not have retained counsel for the sole purpose of intervening, some might have, and others at least might have chosen to opt out, had that protection not been removed as well.[13] Of course, any such intervenors protect only their own interests, which differ dramatically from those of class members who are not presently injured. *See infra* part VI.A.2. Thus, futures-only classes are still highly vulnerable to abuse.

This case also presents a radical extension of the mandatory class action. The class complaint seeks, and the settlement provides, predominately monetary relief. While

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[11](...continued)
that the notice given to *Ahearn* class members was particularly hard for them to understand).

[12]*See* Crampton, supra note 4, at 828.

[13]Two groups of plaintiffs intervened in this action. Thus, while exclusion of present claimants appears to have limited the opposition, it did not completely eliminate it.

historically we have permitted mandatory actions when a class sought to litigate joint rights regarding a common fund, the only *common* fund in this case is the settlement proceeds. To the extent that there is a *limited* fund, it is a contrived one, created by the litigation and settlement strategies of Fibreboard and its insurers. *See infra* note 17.

The concept of a futures-only mandatory action is also self-contradictory. If we must bind victims in the class in order to protect their rights and ensure an equitable distribution, then we must bind *all* such victims, not just some. Limiting the class to future claimants grants the equivalent of an automatic opt-out to present claimants, and there is simply no principled way of distinguishing the one group from the other.[14]

Arbitrariness in the class definition might not present a problem by itself, but future claimants, unlike present claimants, are particularly vulnerable. Exclusion of all present claimants has the effect (if not the purpose) of excluding all those who are likely to receive notice, monitor the class action, and oppose the class attorneys' conflicts and other inadequacies.[15]

Finally, this is a settlement class action. Permitting such actions creates an unparalleled opportunity for collusion between defendants and class counsel, as both stand to gain from negotiating a deal providing generous fees for counsel and

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[14]*See* Koniak, *Feasting*, *supra* note 4, at 1058; Crampton, *supra* note 4, at 829-30.

[15]In addition, the settlement's silence regarding the actual compensation that claimants can expect--other than various caps and limitations on recovery--makes it difficult for class members and courts to evaluate the settlement. That lack of information might be one of the reasons that the intervenors chose not to attack the settlement's substantive fairness on appeal.

meager recovery for the class. *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 788 (3d Cir.), cert. denied, --- U.S. ----, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995); Crampton, *supra* note 4, at 826-27. Moreover, a defendant may pick his opposing counsel and then negotiate with absolutely nothing to lose from walking away from the deal; class counsel, on the other hand, work *pro bono* unless they consent to a settlement.

If nothing else, use of a mandatory settlement action with an automatic opt-out for all those likely to intervene, and no opt-out for anyone else, raises a red flag. To the best of my knowledge, no one has ever attempted to do such a thing before: Even the now-discredited *Georgine* settlement permitted opt-outs.

C. Diminished Protection for the Class.

A novel action laden with such an extreme potential for abuse certainly demands a close look, but the majority accepts the settling parties' distortion of that background reality and actually ratchets *down* the degree of protection accorded absent class members.

The *Ahearn* settlement is really two agreements: one between Fibreboard and the insurers to settle their policy disputes for $1.525 billion, and another between the futures class and Fibreboard to limit the class's recovery to insurance proceeds plus $10 million of Fibreboard's $225-250 million net worth. Fibreboard and the insurers did not need class proceedings to reach the first agreement. Avoiding an all-or-nothing judgment in the California coverage litigation gave them a powerful incentive to settle, regardless of whether they could extinguish future claims at the same time. As the

majority observes, "*None* of the parties was prepared to take the enormous risk inherent in that litigation." Maj. op. at 993 (emphasis added). In fact, Fibreboard and the insurers did reach such a settlement. *See* maj. op. part III (unanimously approving that agreement).

With that cloak removed, the second half of the *Ahearn* settlement is wholly baseless. The class members surrendered their claims against Fibreboard, submitted to an arbitration procedure, and agreed to a total cap on damages, individual caps on damages, an absolute ban on punitive damages, and other restrictive provisions. In exchange, Fibreboard gave the class a mere $10 million--less than five percent of its net worth. Fibreboard sought certification based upon a constructive bankruptcy theory, but it walked away with barely a scratch. Not surprisingly, Fibreboard's stock skyrocketed when the settlement was announced. *See* Coffee, *supra* note 1, at 1402 & n. 232.

Even accepting the settling parties' mischaracterization of the settlement does little to justify certification, however, for traditional class protections still prevent it.

IV. Due Process and the Right To Opt Out.

The majority's treatment of opt-out rights is a paradigmatic example of its erroneous reasoning. Though the Court plainly held in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 105 S.Ct. 2965, 2974-75, 86 L.Ed.2d 628 (1985), that class members have a right to opt out of actions (such as this) seeking primarily monetary relief, the majority refuses to recognize that right, on the ground that it was not historically available in traditional "common fund" litigation.

The majority's holding that *all* rule 23(b)(1) class actions are immune from *Shutts* is in direct conflict with the holding of a sister circuit.[16] Moreover, this case presents anything but a traditional common fund,[17] and the majority's attempt to

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[16]The Ninth Circuit has held that a class action certified under rule 23(b)(1) and (b)(2) cannot bind absent plaintiffs unless they are allowed to opt out. *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir.1992) (holding that absent plaintiffs were not bound by a rule 23(b)(1)-(b)(2) class action for money damages, because the original class action court did not have personal jurisdiction over the plaintiffs and did not provide them with an opt-out right), *cert. dismissed as improvidently granted*, 511 U.S. 117, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994). *See also In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760 (3d Cir.) (reversing an injunction and allowing a collateral attack against a rule 23(b)(1)-(b)(2) class action to proceed in a different jurisdiction), *cert. denied*, 493 U.S. 821, 110 S.Ct. 77, 107 L.Ed.2d 44 (1989). In *dictum*, the Second Circuit has recognized that a rule 23(b)(1) action that aggregates claims seeking legal remedies requires an opt-out right. *In re Joint E. & S. Dist. Asbestos Litig. (Findley I)*, 982 F.2d 721, 735 (2d Cir.1992) (upholding a mandatory class action by beneficiaries of a trust but recognizing that "[i]f the members of the plaintiff class were not all beneficiaries of the Trust, we would think that the applicable standards for personal jurisdiction would be drawn more from *Shutts* than from *Hansberry* "); *In re Joint E. & S. Dist. Asbestos Litig. (Findley III)*, 78 F.3d 764, 777-78 (2d Cir.1996) (distinguishing the class action from that in *Shutts* because the restructuring of a trust is an equitable remedy).

[17]The paradigmatic use of rule 23(b)(1)(B) is for a common (or limited) fund, which exists

> when a fixed asset or piece of property exists in which all class members have a preexisting interest, and an apportionment or determination of the interests of one class member cannot be made without affecting the proportionate interests of other class members similarly situated. Classic illustrations include claimants to trust assets, a bank account, insurance proceeds, company assets in a liquidation sale, process of a ship sale in a maritime accident suit, and others.

1 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS (continued...)

analogize it to an action to settle a trust is entirely unjustified: Far from adjudicating equitable rights in a preexisting fund, the settlement *creates* a common fund by extinguishing *personal* rights of action. In short, the majority rationalizes its evisceration of a right that we have already recognized with a call to historical rigidity.

A. Basic Requirements of the Shutts Case.

Shutts could not be more unambiguous:

> [W]e hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court.

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[17](...continued)
ACTIONS (hereinafter "NEWBERG ON CLASS ACTIONS") § 4.09, at 4-32 through 4-33 (3d ed. 1992). The language of rule 23(b)(1)(B) is broad enough to encompass more than the traditional common fund, id. at 4-31, and the fact that an action meets the requirements of rule 23(b)(1)(B) does not necessarily transform it into one for the division of a fund. This case deviates from the traditional common fund in a number of ways. First, there is no fund to speak of. The insurance proceeds are not common or limited, but are simply all that the defendants are willing to provide to the settlement. A settlement offer is far from "a fixed asset ... in which all class members have a preexisting interest." The fact that Fibreboard's asbestos abilities are greater than its assets is also insufficient to create a common fund, even though it is sufficient to meet the requirements of rule (b)(1)(B). *See* Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistage Class Actions after* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1, 42 (1986) (describing the "constructive bankruptcy" theory for certifying mass torts under rule (b)(1)(B)). *See also* Marcus, *supra* note 4, at 877-81 (suggesting that a common fund theory does not work for mass torts). Second, the plaintiffs do not have a preexisting interest in Fibreboard's assets; the purpose of the suit is to establish those rights and not to divide preexisting rights.

472 U.S. at 812, 105 S.Ct. at 2974-75 (citations and footnotes omitted). The Court, however, specifically limited its holding to claims "for money damages or similar relief at law," as opposed to actions seeking "equitable relief."[18] Thus, *Shutts* teaches that in an action seeking money damages, an absent plaintiff is entitled to the right to opt out.[19]

Following *Shutts*, a mandatory class action is viable in two cases: (1) where the court has jurisdiction over all the plaintiffs or (2) where the plaintiffs seek equitable relief. Unlike the majority, I believe that whether a class action seeks equitable relief or money damages can be determined only by focusing on the underlying remedy the plaintiffs seek. *See, e.g., Findley I*, 982 F.2d at 735 (affirming certification of a mandatory class action but noting that it would violate due process if the request for relief were for money damages rather than division of a trust).

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[18]472 U.S. at 811 & n. 3, 105 S.Ct. at 2973-74 & n. 3 ("Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief.").

[19]Although *Shutts* involved a state court action, the consensus view is that it applies to federal class actions as well. *See Matsushita Elec. Indus. Co. v. Epstein*, --- U.S. ----, ----, 116 S.Ct. 873, 888, 134 L.Ed.2d 6 (1996) (Ginsburg, J., concurring in part and dissenting in part) ("In [Shutts], this Court listed minimal procedural due process requirements a class action money judgment must meet if it is to bind absentees; those requirements include notice, an opportunity to be heard, a right to opt out, and adequate representation."); *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 198-99 (3d Cir.1993); *Brown*, 982 F.2d at 392; *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir.1992) *(dictum), cert. dismissed*, 506 U.S. 1088, 113 S.Ct. 1070, 122 L.Ed.2d 497 (1993); *In re Real Estate Title*, 869 F.2d at 766 n. 6. *See also* Miller & Crump, *supra* note 17, at 29-31.

If one focuses on the plaintiffs' remedy, the *Ahearn* class cannot be characterized as one "seeking equitable relief." The complaint alleges only personal causes of action against Fibreboard for money damages.[20] The prayer for relief seeks general and special compensatory damages, punitive damages, costs of the suit, appropriate declarations and orders, and other relief as may be deemed just and proper. These remedies represent paradigmatic legal remedies.[21] 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES (hereinafter "LAW OF REMEDIES") §§ 3.1-3.2 (2d ed. 1993). The majority, maj. op. at 976, agrees: "The central remedial and legal theory of each of the named plaintiffs [is] that Fibreboard is liable in tort for damages incurred due to exposure to Fibreboard asbestos."

B. The Majority's Circumvention of Shutts.

The majority circumvents *Shutts* by calling *Ahearn* an equitable action.[22] Instead of focusing on the plaintiffs'

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[20]The specific counts in the complaint are (1) negligent failure to warn; (2) strict product liability; (3) breach of express and implied warranty; (4) concert of action and conspiracy; and (5) "all other viable claims." The last count consists of every "claim or cause of action" that the plaintiffs can assert against Fibreboard.

[21]*See also* Marcus, *supra* note 4, at 888 ("[T]he limited fund concept should rarely, if ever, be available in mass tort litigation. Even if it can be sustained in some instances, there is no denying that the claims asserted are for compensatory damages, and there is arguably a constitutional right to opt out.").

[22]*See* maj. op. at 986 ("The limitation of *Shutts* to claims of unknown plaintiffs that are predominantly for money damages forecloses application of its holding to 23(b)(1)(B) actions which have always been equitable and often involve unknown plaintiffs."). The majority also intimates that *Shutts* does not apply to rule 23(b)(1)(B) actions because the absent plaintiffs are unknown. *See*

(continued...)

remedies, the majority characterizes the action based on which subsection of rule 23 the court invoked to certify the class. From the historical fact that rule 23(b)(1)(B) originated in courts of equity, the majority concludes that all actions certified under rule 23(b)(1)(B) are equitable and thus immune from *Shutts*.

1. Conflict with Other Circuits.

The majority's holding is in direct conflict with decisions of the Third and Ninth Circuits. *See Brown; In re Real Estate Title*. The Ninth Circuit has directly held that *Shutts* applies to rule 23(b)(1)-(b)(2) actions when the plaintiffs' underlying claims are for money damages. *Brown*, 982 F.2d at 392. The Third Circuit also has recognized that a mandatory class action does not have a *res judicata* effect on absent class members when the underlying claims are for money damages and the court did not have personal jurisdiction over the plaintiffs. *In re Real Estate Title*, 869 F.2d at 768-69. The majority fails to discuss either case.

Both cases arose out of the same antitrust class action. *See Brown*, 982 F.2d at 388-89. The original class complaint

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[22](...continued)
maj. op. at 986. The unknown- plaintiff exception in *Shutts* does not apply to this case, however.

The court lacks personal jurisdiction over a large number of known plaintiffs who have manifested injuries but failed to file suit before the class action was filed. Moreover, a large number of the exposure-only plaintiffs are known. For example, shipyard workers who have not yet manifested any sign of disease could easily be identified and notified of the settlement. They then could decide whether to opt out. If they did, their individual and derivative wrongful death claims no longer would be part of the settlement.

sought money damages and injunctive relief and was certified under rule 23(b)(1) & (b)(2). *In re Real Estate Title*, 869 F.2d at 760, 763. The action settled on terms favorable to the defendant, and a number of absent plaintiffs were left without a settlement check.

The first case challenging the no-opt-out class action arose by way of injunction in the Third Circuit. Following settlement of the class action, a number of absent plaintiffs filed a new suit against the same defendants for the same activity. The defendants asked the district court that heard the original class action to enjoin the Arizona state court suit. *In re Real Estate*, 869 F.2d at 762. The district court granted the injunction, but the Third Circuit reversed, classifying the original class action as a hybrid suit seeking both money damages and equitable relief. *Id.* at 768-69. The court applied *Shutts* and held that the district court did not have personal jurisdiction over the absent plaintiffs in the original action and that it would violate due process for the court to enjoin a collateral attack on the class action. *Id.*

The other shoe dropped in a subsequent action filed in federal court in Arizona. The defendants raised a *res judicata* defense to the plaintiffs' claim, pointing to the class action settlement. The Ninth Circuit rejected the defendants' arguments, holding that the class action did not have a res judicata effect on absent plaintiffs over whom the district court in the original class action did not have personal jurisdiction. *Brown*, 982 F.2d at 392. The court relied on *Shutts* and held that the absent plaintiffs' money damage claims could not be

foreclosed by a rule 23(b)(1) class action, because the action did not include a right to opt out. *Id.* [23]

2. Conflict with Shutts.

The majority's approach to classifying this action is also fundamentally at odds with the approach used by the *Shutts* Court. The exception in *Shutts* is for actions seeking "equitable relief," not for class actions that have their origins in equity.[24] The Court explicitly recognized that class actions originated as an equitable joinder device, and *all* class actions are "equitable" in that limited sense. *Shutts*, 472 U.S. at 808, 105 S.Ct. at 2972-73. *See also Hansberry v. Lee*, 311 U.S. 32, 41, 61 S.Ct. 115, 118, 85 L.Ed. 22 (1940) ("The class suit was an invention of equity...."); 7A WRIGHT & MILLER § 1751, at 7. Despite that fact, the Court classified the action in *Shutts* as one for money damages. 472 U.S. at 811, 105 S.Ct. at 2974.

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[23]The court also held that the absent plaintiffs' claims for injunctive relief were barred by *res judicata* because the class action could bind absent plaintiffs on their claims for equitable relief. *Brown*, 982 F.2d at 392.

[24]It is notable that the *Shutts* Court used the phrase "equitable relief." *Shutts*, 472 U.S. at 812 n. 3, 105 S.Ct. at 2974 n. 3. Equity courts were distinguished from law courts in that their substantive rules, procedures, and remedies differed from law courts. 1 LAW OF REMEDIES § 2.6(3) at 154-55. As one commentator pointed out, procedure "will seldom if ever form a basis for distinguishing law from equity" where the distinction matters. *Id.* at 155 n. 1.

The question then becomes whether the class action is an equitable remedy or an equitable procedural device. I discuss why the rationale of *Shutts* supports that latter interpretation at *infra* part IV.B.3. Further support for the obvious proposition that the class action is a procedural tool comes from the fact that it has never been treated as a "remedy." See 1 LAW OF REMEDIES §§ 1.1-1.6 (listing all remedies available at law and equity).

The only possible conclusion that can be drawn from the Court's reasoning is that the distinction between damage remedies and equitable remedies turns on what remedies the plaintiff seeks, not on his choice of joinder devices. To hold otherwise, as the majority does in this case, would create an internal inconsistency in *Shutts:* If the origin of the class action is determinative of the classification of an action, then every class action, including the one in *Shutts*, would be an equitable action.

3. Misunderstanding Equitable Remedies.

The majority's assertion that rule 23(b)(1)(B) actions are unique in that they involve only equitable claims is based on an apparent misunderstanding of "equitable remedies" and the history of the class action. Prior to the merger of law and equity, the majority would have been correct in classifying all rule 23(b)(1)(B) class actions (or more appropriately their historical antecedents) as equitable actions, but for reasons different from those the majority offers.

Before law and equity were merged, every class action would have been equitable, as the class action was a procedural device that was available only in courts of equity.[25] As a result, every class action aggregated claims seeking equitable remedies or applying equitable substantive law. The fact that the device was once used exclusively by equity courts does not foreclose

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[25]The class action originated in courts of equity as a procedural joinder device. *See generally* 1 LAW OF REMEDIES § 1.1, at 1-2 (distinguishing procedural law, substantive law, and remedial law); *id.* § 2.1(1), at 57 (noting that differing procedures were available in equity and legal courts).

the possibility, however, that the device currently is used in conjunction with legal remedies.[26]

Even the majority's own authorities recognize that class actions are now used to aggregate *both* legal and equitable claims. See 1 NEWBERG ON CLASS ACTIONS § 1.18, at 1-46 (recognizing that suits certified under rule 23(b)(1) "predominately (but not exclusively) involve suits seeking equitable relief"). When Professor Newberg posits that *Shutts* will not apply to classic limited fund cases, he does so because those cases aggregate equitable claims, not because the device had its origins in equity.

> It is unlikely that *Shutts* will be construed to change the highly focused nature of the *equitable relief* addressed in these limited fund class actions by requiring opt-out rights which might serve to frustrate the equitable ends of these suits. There are other types of equitable class actions, such as suits to declare a dividend or suits for injunctive relief against a defendant who has acted generally against a class, which similarly ... will not be challenged.

Id. § 1.21, at 1-49 (emphasis added, footnotes omitted).

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[26] In similar situations, where an equitable procedural device has been extended to actions at law, courts have used at least two distinct tests for determining equitable status. The first test focuses on the remedy: If the claim seeks a coercive remedy, it is deemed equitable. The second test characterizes a claim as equitable if the plaintiff seeks to enforce a right that was originally created in the equity courts, or a right that was traditionally decided according to equitable principles. 1 LAW OF REMEDIES § 2.6(3), at 154-55.

4. Formalistic Distinctions.

The majority's unyielding mantra that rule 23(b)(1) actions are equitable actions makes due process turn on an untenable formalistic distinction between rule 23(b)(1) and rule 23(b)(3), whereunder class actions under rule 23(b)(3) are subject to *Shutts*, and those certified under rule 23(b)(1) are not. The distinction finds no support in *Shutts*, which involved a state equivalent of rule 23(b)(3) and not the federal rule itself. The Court's analysis, which centered on the need to protect an absent plaintiff from the inherent dangers of representative actions, did not focus on what type of class action was involved, for relying on such a distinction ignores the fact that many class actions can be certified under more than one subsection of rule 23. 1 NEWBERG ON CLASS ACTIONS § 4.01, at 4-4 through 4-5; 3B J.W. MOORE ET AL., MOORE'S FEDERAL PRACTICE P 23.31[3], at 236-37 (2d ed. 1995); 7A WRIGHT & MILLER §1772, at 425. In fact, a vast majority of classes that meet the requirements of rule 23(b)(1)(B) inevitably will satisfy the rule 23(b)(3) requirements. 1 NEWBERG ON CLASS ACTIONS § 4.01, at 4-5. Due process does not turn on such formalistic distinctions.[27]

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[27] *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 299, 109 S.Ct. 2909, 2933, 106 L.Ed.2d 219 (1989) (O'Connor, J., concurring in part and dissenting in part) (stating that "the applicability of a provision of the Constitution has never depended on the vagaries of state or federal law"); *Escobedo v. Illinois*, 378 U.S. 478, 486, 84 S.Ct. 1758, 1762, 12 L.Ed.2d 977 (1964) (declining to "exalt form over substance" in determining the temporal scope of Sixth Amendment protections); *Crowell v. Benson*, 285 U.S. 22, 53, 52 S.Ct. 285, 293, 76 L.Ed. 598 (1932) (opining that "regard must be had, ... in ... cases where constitutional limits are invoked, not to mere matters of form but to the substance of what is required"); *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 235, 17 S.Ct. 581, 584, 41 L.Ed. 979 (1897) ("In

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C. The Distinction Between Law and Equity.

The majority's argument that applying *Shutts* to rule 23(b)(1) would render all mandatory class actions unconstitutional, is also premised on a faulty understanding of the distinction between law and equity. *See* maj. op. at 987 n. 16. What the majority fails to acknowledge is that the distinction between money damages and equitable remedies preserves mandatory class actions in the vast majority of cases, including traditional common fund cases from equity. *See* NEWBERG ON CLASS ACTIONS § 1.18, at 1-46 (recognizing that the majority of actions that meet the requirements of rule 23(b)(1) seek equitable relief). The only cases affected by *Shutts* are modern cases, such as *Ahearn*, that fall within the broad scope of the rule but do not involve a true common fund.

Take for example *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 14 L.Ed. 942 (1853), and *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662, 35 S.Ct. 692, 59 L.Ed. 1165 (1914), two cases that represent the paradigmatic mandatory class action. Both survive *Shutts* because neither involved money damages. In *Smith*, the class representatives filed a bill in chancery for the division of a trust, a traditional equitable remedy.[28] 57 U.S. (16

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[27](...continued)
determining what is due process of law regard must be had to substance, not to form.").

[28]The suit was over proceeds from a book fund maintained by the Methodist Episcopal Church. *Smith*, 57 U.S. (16 How.) at 303. The fund was established for the care of traveling preachers. *Id.* When the church divided over slavery, both sides agreed to split church property based upon a prearranged formula. *Id.* at 305. The traveling preachers from the south sued the northern (continued...)

How.) at 312. *See* 1 LAW OF REMEDIES § 2.3(1), at 75. In *Ibs*, the mandatory class action at issue also involved distributions from a trust. [29] 237 U.S. at 671, 35 S.Ct. at 695. Although both actions resulted in a distribution of money, neither involved a legal claim for money damages. *See* 1 LAW OF REMEDIES § 3.1 (discussing money awards available in equity, but distinguishing between money damages and equitable remedies that award money).

The difference between legal and equitable actions, while subtle, is important. In an equitable action such as an action by the beneficiary of a trust, a plaintiff's *pro rata* rights to the trust corpus are already established. Whether the action proceeds individually or as a class action is irrelevant to absent plaintiffs, because in both cases their rights in the corpus of the trust will be affected. See *In Re Joint E. & S. Dist. Asbestos Litig. ("Findley II")*, 878 F.Supp. 473, 530-33 (E. & S.D.N.Y.1995) (explaining why the already severe limitations on a trust beneficiary mean that a representative action will do little to diminish a beneficiary's rights). In fact, in some cases the class device enhances an absent plaintiff's rights by providing him a voice; the classic limited fund is such a case. The same is not true in a case for money damages.

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[28](...continued)
church because it refused to relinquish that portion of the fund that belonged to the southern church. *Id.*

[29]*Ibs* involved a suit, for money damages, by a participant in a mortuary fund in state court. The question was whether a prior mandatory class action would have a *res judicata* effect on the plaintiff. The class action was against an insurance company and sought to compel the company to make distribution from a trust. The court held that the action against the trust must be given *res judicata* effect in the later proceeding.

The decision to proceed individually or as a class makes all the difference in a case for money damages, because only in a class action are a plaintiff's rights controlled by another party. The most obvious consequence of such control is that class representatives may settle to the detriment of absent class members in order to benefit themselves. The inherent risk of such a result is exactly what drove the Court to adopt due process protections in such cases. See *Shutts*, 472 U.S. at 809-11, 105 S.Ct. at 2973-74.

D. Unconstitutional Use of the Federal Rules.

Finally, the majority's reliance on the strong presumption of constitutionality that the Federal Rules of Civil Procedure receive is misplaced. The novelty in this case is not the insistence on opt-out rights but on the extension of class actions, particularly rule 23(b)(1)(B) class actions, to mass torts and the expansion of rule (b)(1)(B) to "constructive bankruptcy." Such a use of the federal rules is novel, and in particular the rise of mass torts was unforeseen by the drafters of the rule. *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 & n. 23 (5th Cir.1996).

The majority's attempt to hide behind the traditional acceptance of mandatory class actions is unavailing in this extension of rule 23(b)(1), for the presumption of constitutionality enjoyed by the Federal Rules of Civil Procedure disappears when the rules are applied in a way unanticipated by their drafters. *See* 19 WRIGHT & MILLER § 4509. In short, while this action falls within the broad scope of rule 23(b)(1)(B),

that fact does not immunize it from due process protections, including opt-out rights.[30]

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[30]The appellees argue that even if due process requires an opt-out right, the settlement's "back-end" exit satisfies due process. Even if a "back-end" exit could serve as a proxy for an opt-out provision--a suggestion made only by the Fourth Circuit--the procedure provided in *Ahearn* falls far short of satisfying due process. *See, e.g., In re A.H. Robins Co.*, 880 F.2d 709, 745 (4th Cir.) (finding that a "back-end" exit right provides "everything that an express opt-out provision could give a class member if such right is required under due process"), *cert. denied*, 493 U.S. 959, 110 S.Ct. 377, 107 L.Ed.2d 362 (1989).

In *A.H. Robins*, the court could determine with confidence that the "back-end" exit provided absent plaintiffs with the same rights they would have in an opt-out class action. The class action involved a trust established during a chapter 11 bankruptcy. *A.H. Robins*, 880 F.2d at 717. An absent class member could seek a jury trial if the alternative dispute resolution provided for by the trust did not settle the plaintiff's claim in a satisfactory fashion. *Id.* at 722. Liability, causation, and damages would be submitted to the jury. *Id.* Punitive damages were disallowed, but a plaintiff seeking a jury trial would be entitled to an amount from the trust in lieu of the punitive damage award. *Id.* The exit mechanism left absent plaintiffs a right to a jury trial on precisely those issues on which they had a right to a jury trial before certification. *Id.* at 744 ("The Plan gives every such class member the right to have her claim settled in a trial with all the procedural rights opt-out provision could give a class member if such right is required under due process.") The "back-end" exit in this case fails to provide absent plaintiffs with a right substantially equivalent to a jury trial. The exit is nothing more than window dressing. While it allows claimants to settle disputes in front of a jury, it limits all damages to $500,000. By contrast, some plaintiffs have been able to recover several million dollars from asbestos defendants at trial. *See, e.g., Mechanic's Family Awarded $14 Million in Auto Brake Asbestos Case*, WEST'S LEGAL NEWS, June 20, 1996, at 1996 WL 339400 (discussing asbestos verdict for two plaintiffs); *Asbestos Litigation--Damages*, CHI. DAILY LAW BULLETIN, June 13, 1995, at 1 (discussing $12 million verdict); *Notable Verdicts*, NAT'L LAW JOURNAL, Apr. 15, 1996, at A15 (discussing $2.2 million jury verdict); *Reviewing Verdicts for Excessiveness*, NEW YORK L.J., Apr. 10, 1996, at 1 (discussing verdicts of $64.6 million for four plaintiffs); *$18 Million Verdict for Asbestos*

(continued...)

V. Commonality and Typicality.

The majority is correct that our precedents preclude us from decertifying the class for lack of commonality and typicality. The majority's discussion of these criteria is misleading, however, and its readiness to skip over the protections without considering the consequences is yet another manifestation of its tunnel vision.

A. Circuit Precedent.

Long before defense attorneys even dreamed of mandatory, mass-tort, futures- only class actions, we held that "tentative or temporary settlement classes are favored when there is little or no likelihood of abuse, and the settlement is fair and reasonable and under the scrutiny of the trial judge." *Meat Price Investigators Ass'n v. Iowa Beef Processors (In re Beef Indus. Antitrust Litig.)*, 607 F.2d 167, 174 (5th Cir.1979), *cert. denied*, 452 U.S. 905, 101 S.Ct. 3029, 69 L.Ed.2d 405 (1981). We even went so far as to "agree" with Professor Newberg that parties may "compromise their differences, including class action issues, through this means." *Id.* at 177-78 (quoting 3 NEWBERG ON CLASS ACTIONS § 5570c, at 476). We took *Beef Industry* to its logical conclusion two years later, finding that evaluation of the fairness of a settlement entails a consideration of "the strength of plaintiffs' case on the merits,"

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[30](...continued)
Claims, NEW YORK L.J., Feb. 15, 1996, at 2 (discussing verdict for five plaintiffs). Such a severe limitation on a party's ability to prove and try damages deprives him of an essential element of a jury trial. I certainly cannot say that a procedure that caps a plaintiff's damages gives him "everything that an express opt-out provision could give a class member." *A.H. Robins*, 880 F.2d at 744.

including "the risks of class decertification." *Adams Extract Co. v. Pleasure Hours, Inc. (In re Corrugated Container Antitrust Litig.)*, 643 F.2d 195, 216 (5th Cir.1981).

Note the bizarre effect of these opinions: Certification criteria are designed in part to protect the class against inadequate representatives, but *Beef Industry* permits those very representatives to compromise the requirements. *Corrugated Container* compounds the effect by holding that certification criteria are part of the merits of a class action. Thus, when it is less likely that certification is proper, and therefore more likely that an individual plaintiff has a right to prosecute his own action, a *smaller* settlement is necessary to extinguish that right.

The majority is more subtle, finding that all class members have a common interest in reaching a settlement that includes certain terms. *See* maj. op. at 975. Even so, a generalized common interest is not a "*question[ ] of law or fact* common to the class." FED.R.CIV.P. 23(a)(2) (emphasis added).

Similarly, the majority finds that the legal and remedial theories of the class representatives are typical of those of the class because all class members (1) claim that "Fibreboard is liable in tort for damages incurred due to exposure to Fibreboard asbestos" and (2) possess a common interest in settling for a large amount. See maj. op. at 975-76. Once again, the latter category of "interests" has nothing to do with the underlying legal theories.

The majority's characterization of the plaintiffs' claims is also true only at an extreme level of generality. If a man raped a woman in California and exposed himself to another in Texas, both women might claim that he is "liable in tort for damages

incurred due to [sexual misconduct]," but no one would seriously claim that the legal theory of battery is similar to that for, say, intentional infliction of emotional distress.

Nor have the settling parties even attempted to bootstrap themselves into typicality by crafting a settlement that postpones resolution of non-typical issues. The settlement's prohibition on punitive damages affects plaintiffs from different states differently; its caps on individual recovery discriminate against the most seriously injured class members; and its spendthrift provisions alter the distribution of funds between extant and latent claimants. Thus, the settling parties *have* negotiated an alteration of the class members' substantive rights *vis-a-vis* one another. In short, the majority dutifully follows our precedent by treating commonality and typicality as mere procedural obstacles to be cleared out of the way.

B. Problems with Circuit Precedent.

Three factors make our duty to follow *Beef Industry* and *Corrugated Container* a regrettable one. First, rule 23(a) has a purpose: to protect the due process rights of absent class members. [31] Compliance with the rule might prevent us from lumping people with divergent interests into a single class, but the rule is meant to do just that. [32]

Second, the difficulty inherent in assessing the substantive fairness of a settlement makes prophylactic

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[31] *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 796 (3d Cir.), *cert. denied*, --- U.S. ----, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995); 1 NEWBERG ON CLASS ACTIONS § 1.13, at 37-38.

[32] *See* Marcus, *supra* note 4, at 899-90 (criticizing Ahearn settlement).

procedural protections crucial to the protection of absent plaintiffs. [33] The range of "fair" settlements is wide in any case, [34] and settlement classes present unique opportunities for collusion between class counsel and defendants. [35] Once the machinery of a settlement class action is set in motion, the judiciary has a very hard time controlling it; thus, it is critical that we craft that machinery well.

Finally, the majority once again fails to consider the interaction of these due process protections with the others it denies. Professor Newberg, the primary proponent of settlement classes, justified relaxing the rule 23(a) criteria by looking to other protections, most notably opt-out rights, to protect the class. *See* 2 NEWBERG ON CLASS ACTIONS § 11.28, at 60-61. Similarly, the *Beef Industry* court observed that opt-out rights would help "offset" the loss of other protections. *See* 607 F.2d at 175. Thus, relaxing rule 23(a) criteria and denying opt-out rights make for a lethal combination. [36]

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[33] *See Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 683 (7th Cir.1987) ("The agency problems which [class] actions create require that the district judge be vigilant in protecting the procedural rights of class members."); cf. 7B WRIGHT & MILLER § 1785, at 103 ("A formal class certification determination plays an important role in assuring adequate protection to the absent class members.").

[34] *See* Koniak, *Looking Glass*, *supra* note 4, at 18 ("A poisoned or tainted pudding may taste okay, if not delicious.").

[35] *See supra* page 1008; *General Motors*, 55 F.3d at 788; Coffee, *supra* note 1, at 1378-82.

[36] While I would follow *Beef Industry* and *Corrugated Container* reluctantly, the majority actually embraces them on the ground that settlement

(continued...)

VI. Inadequate Representation.

That leaves two significant due process requirements, the first of which is adequate representation. Instead of vigorously enforcing this requirement, however, the majority lets it slide as well.

A. Standard of Review.

In ordinary litigation, a plaintiff does not need the court to ensure that his attorneys are performing adequately; he can monitor and control them himself. In class litigation, however,

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[36](...continued)
negotiations generate information. *See* maj. op. at 975-76. While it is hard to argue in favor of ignoring information, settlement negotiations generate little information regarding commonality and typicality, and it is the majority that ignores any such information.

First, no competent counsel would enter negotiations without first divining his clients' legal theories and the questions of law or fact underlying them. Thus, "the process of negotiation does not reveal anything about commonality and typicality." *General Motors*, 55 F.3d at 796.

Second, this justification for relaxing the requirements is inconsistent with the majority's application of them. To the extent that diverging interests emerge in negotiations, those interests militate against mass certification, as they indicate that class counsel negotiated the settlement while suffering from a conflict. The majority relies upon the existence of information in relaxing the criteria, but ignores that information when applying them.

Finally, the majority's emphasis on information is ironic. Conventional wisdom posits that early settlement *decreases* the amount of information available to counsel and the court. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION 3D § 30.45, at 243 (1995).

class members have no practical control over their attorney.[37] Their only remedy against shoddy representation is to opt out of the class, but the district court denied them even that protection. Having left class members defenseless against their own counsel, the court's duty to ensure adequate representation became all the more critical. Rule 23(a)(4) prohibits a court from certifying a class without first ascertaining that it will receive adequate representation. Rule 23's concerns are not merely prudential, but constitutional: Due process demands that class members receive adequate representation before they are bound by a judgment.[38] An attorney who labors under a conflict of interest cannot satisfy the requirements of rule 23(a)(4).[39]

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[37]In theory, the class representative should control the attorney. In practice, class counsel often selects the class representative and is likely to pick one who is passive. *Cf. In re Dresser Indus.*, 972 F.2d 540, 545 n. 11 (5th Cir.1992) (noting consent of client in a class action is of "limited utility" as a safeguard against conflicts of interest).

[38]*See Woolen v. Surtran Taxicabs*, 684 F.2d 324, 332 (5th Cir.1982) ("The adequacy of representation in Rule 23(a)(4) is that essential to due process under *Hansberry v. Lee*], 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940),] before absent class members can be bound."); *Gonzales v. Cassidy*, 474 F.2d 67, 75 (5th Cir.1973) ("The judgment in a class action will bind only those members of the class whose interests have been adequately represented by existing parties to the litigation.") (quoting *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 691, 81 S.Ct. 1309, 1314, 6 L.Ed.2d 604 (1961)).

[39]*See North Am. Acceptance Corp. v. Arnall, Golden & Gregory*, 593 F.2d 642, 644 n. 4 (5th Cir.) (reasoning that attorney's conflict of interest could prevent class certification under rule 23 because of "the important role the attorney plays in protecting the interests of the class"), *cert. denied*, 444 U.S. 956, 100 S.Ct. 436, 62 L.Ed.2d 328 (1979); *see also In re Fine Paper Antitrust Litig.*, 617 F.2d 22, 27 (3d Cir.1980) (concluding that attorneys with conflict of interest do not meet the adequate representation requirement of rule 23(a)(4)).

We must not confuse rule 23(a)(4) with rule 23(e), which scrutinizes only the substantive fairness of a settlement. [40] Rule 23(a)(4) guarantees due process, and a substantively adequate result cannot cure procedural injustice. [41]

More importantly, substantive adequacy does not necessarily mean that a settlement is truly fair; an attorney who negotiated an adequate settlement might have negotiated a better one but for a conflict of interest.[42] Indeed, it would be

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[40]*See In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216, 224 (2d Cir.) ("We also reject the district court's finding that its authority to approve settlement offers under Fed.R.Civ.P. 23(e) acts to limit the threat to the class from a potential conflict of interest."), *cert. denied*, 484 U.S. 926, 108 S.Ct. 289, 98 L.Ed.2d 249 (1987).

[41][D]ue process must mean something other than that the result is just, otherwise some lynchings would be consistent with due process. A 'fairness' hearing that appraises a settlement made outside the court's presence only as to the substantive fairness of the terms provides no more process than would be provided by a post-lynching hearing that assessed whether the dead guy really did commit the crime.

Koniak, *Feasting, supra* note 4, at 1123.

[42]*See Corrugated Container*, 643 F.2d at 211 n. 25 ("We hasten to add that the adequacy of settlement terms cannot ordinarily redeem a settlement that was bargained by a party in a conflict position.").

> The court, to be sure, will not approve a settlement if it is unfair, but "fairness" may be found anywhere within a broad range of lower and upper limits. No one can tell whether a compromise found to be "fair" might not have been "fairer" had the negotiating [attorney] possessed better information or been animated by undivided loyalty to the cause of the class. The court can reject a settlement that is inadequate; it cannot undertake the partisan task of bargaining for better
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> (continued...)

odd if rule 23(a)(4) did require a court to examine the terms of a settlement; rule 23(a)(4) is a certification requirement, and certification usully precedes settlement. Rules 23(a)(4) and 23(e) are complements, not substitutes; a court applies rule 23(a)(4) before certification to insure procedural fairness and rule 23(e) after settlement to guarantee substantive adequacy.

We apply a mixed standard of review to a district court's determination that a conflict of interest does not exist. The existence of a particular set of circumstances is a factual determination that we review for clear error. Whether those circumstances amount to a conflict of interest is a legal question that we review de novo. *FDIC v. United States Fire Ins. Co.*, 50 F.3d 1304, 1311 (5th Cir.1995) ("we interpret the controlling ethical norms governing professional conduct as we would any other source of law") (quoting *Dresser*, 972 F.2d at 543); *see also id.* (stating that "we will perform a 'careful examination,' or *de novo* review, of the district court's application of the relevant rules of attorney conduct"). No factual dispute exists in this case, and therefore we must review the district court's decisions *de novo*.

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[42](...continued)
terms. The integrity of the negotiating process is, therefore, important.

Haudek, *The Settlement and Approval of Stockholders' Actions--Part II: The Settlement*, 23 SW.L.J. 765, 771-72 (1969), *quoted in In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1125 n. 24 (7th Cir.), *cert. denied*, 444 U.S. 870, 100 S.Ct. 146, 62 L.Ed.2d 95 and *cert. denied*, 444 U.S. 870, 100 S.Ct. 146, 62 L.Ed.2d 95 (1979).

B. Class Counsel's Financial Conflict.

Ness Motley represented the class during settlement negotiations despite a financial interest in reaching a settlement that diverged from the class's interest. A divergent financial interest is a paradigmatic conflict of interest, yet the majority refuses to concede that this conflict may have denied the class adequate representation.

The conflict stemmed from Ness Motley's simultaneous representation of both the class and individual plaintiffs who were also suing Fibreboard. While the class settlement negotiations were proceeding, Fibreboard and Ness Motley agreed to settle all of Ness Motley's pre-existing individual lawsuits for a higher-than-average amount. That settlement was partly contingent, however, on Ness Motley and Fibreboard's settling the class claims.

If the class did not settle its claims, Fibreboard would still pay half of the individual plaintiffs' settlement, but they would receive the entire settlement if the class settled. [43] Because Ness Motley represented the individual plaintiffs, but not the class, on a contingency basis, it had a financial interest in settling the class claims on any terms whatsoever, even if those terms were unfavorable to the class.

The majority dismisses this conflict by pretending that Ness Motley, the individual plaintiffs, and the class had similar interests in reaching a class settlement. This is simply wrong. Ness Motley and the individual plaintiffs had a financial interest in seeing the class settle on *any terms*. In contrast, the class

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[43]The individual plaintiffs also would receive the entire settlement if Fibreboard won the coverage case.

desired a settlement only if it was more lucrative than the alternative--awaiting the outcome of the coverage case. The expected value of that alternative was significant. If the California Supreme Court affirmed the two lower courts that had ruled favorably for the class, the class would enjoy a practically unlimited compensation fund. Accordingly, it is easy to imagine a proposed settlement beneficial to Ness Motley and the individual plaintiffs but unfavorable to the class.

The district court never should have allowed Ness Motley to represent the class. Rule 23(a)(4) simply does not permit an attorney to represent a class if he suffers from a conflict of interest. It does not matter whether Ness Motley negotiated a favorable settlement; rule 23(a)(4)'s concerns are procedural, not substantive. Even if, arguendo, the settlement was favorable, an unconflicted attorney might have negotiated a better one. Fibreboard's attorneys knew that Ness Motley had an interest in settling on any terms, and they undoubtedly converted this knowledge into negotiating leverage.

The conflict of interest in this case was direct and egregious. But I would go a step further and prohibit class counsel from ever simultaneously representing individual plaintiffs in cases such as this, as there is too great an opportunity for corruption.

Consider the different fee structures a plaintiffs' attorney faces in class and individual litigation. As class counsel, he will be compensated under the lodestar formula, [44] leaving him no

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[44]Under the lodestar formula, a court determines a class attorney's compensation by multiplying the number of hours he has spent on the litigation by an appropriate hourly wage. While the court may determine the hourly wage

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financial stake in the settlement. When representing an individual plaintiff, he will receive a contingency fee, vesting him with a significant financial stake in the outcome of the litigation.

A shrewd but unethical attorney will accept a significantly smaller settlement in a class action in exchange for a more modest increase in an individual settlement. And even an attorney who would refuse such an outright bribe might be tempted to make concessions during the class negotiations, hoping to develop goodwill that will pay dividends when negotiating over the individual lawsuits. This is not simply a theoretical problem. Consider the *Georgine* case, in which Ness Motley also simultaneously represented the class and individual plaintiffs. While negotiating the class settlement, Ness Motley and the *Georgine* defendants settled the individual claims for a total of about $138 million. Koniak, *Feasting, supra* note 4, at 1067. Under the terms of the class settlement, on the other hand, the individual plaintiffs would have been entitled to a *maximum* of about $90 million. *Id.*

At the least, in *Georgine* Ness Motley treated the individual plaintiffs preferentially. At worst, Ness Motley obtained a concession from the defendants at the expense of the class. In either case, it acted improperly and to the detriment of

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[44](...continued)
in part by looking to how favorable a settlement the attorney negotiated, the number of hours the attorney has worked is usually the chief determinant of his total compensation. See Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U.CHI.L.REV. 1, 50 (1991).

the class, and it is to prevent such behavior that I would prohibit simultaneous representation altogether.[45]

C. The Conflict Between Extant and Latent Claimants.

Another conflict of interest arose from the class attorneys' simultaneous representation of both class members with extant claims and those with latent claims.[46] Because they may seek recovery from the settlement fund immediately, extant claimants would profit from high ceilings on recovery or none at all, as there was little danger that the fund would be depleted before it paid their claims. Latent claimants, on the other hand, cannot seek recovery until some triggering event occurs.[47] Because they may be unable to file a claim for a number of years, they would benefit from damage caps low enough to ensure that the settlement fund will not dry up before it pays their claim.

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[45]See Koniak, *supra* note 4, for a more extensive discussion of the perils of simultaneous representation.

[46]The majority misleadingly labels these groups as "near" and "far" futures, which suggests that the difference between these groups is simply one of degree. In fact, there is a difference in kind. All of the extant claimants, or " 'near' futures," may file claims as soon as approval of the settlement is final. But none of the " 'far' futures" may file suit until some triggering event occurs, and they have no way of knowing when, or even whether, that event will occur.

[47]State law determines exactly what is the necessary triggering event. Some states permit exposure-only victims to seek recovery, while others require that a claimant develop some illness from his exposure before permitting him to recover. One group of latent claimants, of course, are the future family members of asbestos victims: future spouses and unborn or even unconceived children. For this group, the necessary triggering event is marriage or birth.

The majority fails to recognize this obvious conflict of interest. In fact, it makes no mention of the Third Circuit's holding in *Georgine* that an impermissible conflict of interest occurs whenever extant and latent claimants are represented by the same attorney.[48] *Georgine* 's analysis is worth quoting at length:

> The most salient conflict in this class action is between the presently injured and futures plaintiffs. As rational actors, those who are not yet injured would want reduced current payouts (through caps on compensation awards and limits on the number of claims that can be paid each year). The futures plaintiffs should also be interested in protection against inflation, in not having preset limits on how many cases can be handled, and in limiting the ability of defendant companies to exit the settlement. Moreover, in terms of the structure of the alternative dispute resolution mechanism established by the settlement, they should desire causation provisions that can keep pace with changing science and medicine, rather than freezing in place the science of 1993. Finally, because of the difficulty of forecasting what their futures hold, they would probably desire delayed opt out

[48]The majority does distinguish the case before us from *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721 (2d Cir.1992), on the ground that certain members of the class in that case had rights under a trust agreement to have their claims paid first, while there is nothing akin to a trust agreement in *Ahearn*. But *Georgine* also lacked anything similar to a trust agreement, so the distinction does not explain the majority's failure to distinguish *Ahearn* from *Georgine*.

> like the one employed in *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 150 (S.D.Ohio 1992) (heart valve settlement allows claimants who ultimately experience heart valve fracture to reject guaranteed compensation and sue for damages at that time).
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> In contrast, those who are currently injured would rationally want to maximize current payouts. Furthermore, currently injured plaintiffs would care little about inflation-protection. The delayed opt out desired by futures plaintiffs would also be of little interest to the presently injured; indeed, their interests are against such an opt out as the more people locked into the settlement, the more likely it is to survive. *In sum, presently injured class representatives cannot adequately represent the futures plaintiffs' interests and vice versa.*

Georgine, 83 F.3d at 630-31 (emphasis added).

The majority's only explanation for its decision is that the district court's determination that a conflict did not exist was supported by the testimony of the settling parties' expert, Geoffrey Hazard, and the district court's own expert, Eric Green. That explanation is hardly compelling.

The district court's determination that the facts before it did not amount to a conflict of interest was not a finding of fact to which we should defer. Instead, it is a conclusion of law, *see United States Fire Ins. Co.*, 50 F.3d at 1311 (holding that we review *de novo* a district court's application of ethical norms

governing attorney conduct), and it is not enough simply to note that two hand-picked law professors--one chosen by the settling parties and the other by the district court--had the same opinion of the law as did that court.

Nor is the reasoning behind the legal opinions of Professors Hazard and Green persuasive. According to the majority, both concluded that a conflict did not exist, essentially because both extant and latent claimants would be better off with a settlement than without one. If that was their reasoning, they asked the wrong question.

Even if there was no conflict between extant and latent claimants as to *whether* a settlement was a good idea, there was undeniably a conflict between the two groups over the *terms* of the settlement. It may well have been appropriate for the same attorneys to represent extant and latent claimants when negotiating with the defendants over the total amount of the settlement. Once the parties agreed to an amount, however, the interests of extant and latent claimants diverged, and they should have been represented by different attorneys for determination of the terms under which the settlement would be distributed to the class.

D. The Conflict Between Pre-and Post-1959 Victims.

The global settlement achieved a massive redistribution of wealth. Before the settlement, persons who had been exposed to asbestos before 1959 had far more valuable claims than those who had been exposed after 1959. Fibreboard's insurance policies had expired in 1959, so pre-1959 claimants could seek damages from an insured Fibreboard, with virtually unlimited assets, while post-1959 claimants could only hope to recover from the non-insurance assets of Fibreboard, which

amounted to very little. As late as 1993, the settlement value of a pre-1959 claim was three times that of a post-1959 claim. [49] The global settlement, however, eliminated the privileged status of pre-1959 claimants and placed them on equal footing with their post-1959 counterparts.

Because the settlement deprived pre-1959 claimants of a substantial right, they were entitled to separate representation. The majority contends that the class as a whole benefited by sacrificing the special rights of pre- 1959 claimants, and I emphatically agree. That is precisely the problem: It was in the best interest of one part of the class to give up something that belonged to another part of the class, and that created a conflict of interest.

Unitary class counsel was bound to consider the interests of the class as a whole, and those interests required giving up the rights of pre-1959 claimants. But the rights of pre-1959 victims were theirs alone, and they were entitled to counsel who would not relinquish those rights unless it was in their own best interest. Only separate counsel, representing pre-1959 claimants alone, could have done so.

Nor am I persuaded by the majority's contention that Fibreboard would never have negotiated separately with pre-1959 claimants and that unitary representation maximized

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[49] Fibreboard's pre-1959 claims settled for an average of $12,000 in 1993, while its post-1959 claims settled for only $4,000. *See GAF, Fibreboard, Pfizer Report Decline in Asbestos Cases*, MEALEY'S LITIG. REP., June 2, 1995, at 20. In 1994, the discrepancy almost disappeared, with pre-1959 claims settling for $8,000 and post-1959 claims settling for $7,000. *Id.* As the asbestos world became aware that the expected settlement in *Ahearn* would not differentiate between pre- and post-1959 claimants, the settlement values of those claims naturally moved toward a common figure.

the value of the settlement. So long as the class was negotiating with Fibreboard over the total value of the settlement, there was no need for separate representation, as pre- and post-1959 claimants had the same interest in obtaining as large a settlement as possible. It was only after the parties had agreed on the total amount of the settlement and had begun to bargain over how it should be divided among the class that pre-1959 claimants needed separate representation. There is no reason to suppose this would have any effect on Fibreboard's willingness to make concessions; it was interested only in the total amount of the settlement, not the allocation of the settlement within the class.

VII. Impartial Judging.

The second due process requirement that the majority fails to enforce is impartial judging. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). Thus, a litigant is entitled to try his case before a judge who is free of any personal stake in the outcome. *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749 (1927).

This protection is vitally important in a mandatory class action, for the judge is the only person able to protect class members from an unjust settlement. The class members themselves cannot reject the settlement, and they cannot even reject certification by opting out of the class. They can only present their objections at the fairness hearing and hope the judge will reject the settlement as inadequate. If the judge himself is biased in favor of an unfair settlement, then the class has no protection against it.

The intervenors raise serious questions regarding Chief Judge Parker's ability to conduct an impartial fairness hearing.[50] He had mediated the settlement negotiations, undoubtedly urging the parties to settle on terms he believed to be fair, before the case was even filed. In his lengthy opinion approving the settlement, he referred to his "assistance in the discussions" leading to final agreement. 162 F.R.D. at 516.

Having helped to craft the settlement, Chief Judge Parker had a personal stake in finding it to be fair: A determination that the settlement was unfair would imply that he had acted unfairly in helping to craft it. In light of these facts, a person might reasonably conclude that Chief Judge Parker, despite his dedicated and painstaking efforts, probably developed a natural bias in favor of his own work. [51]

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[50]It is well settled that impartiality can reasonably be questioned even where there is no actual bias. *See In re Faulkner*, 856 F.2d 716, 721 (5th Cir.1988) (per curiam).

[51]For similar reasons, Congress in 1978 limited the administrative duties of bankruptcy judges. Under the old Bankruptcy Act, bankruptcy judges (then called referees) had been actively involved in the day-to-day affairs of bankruptcy reorganizations. Congress found this objectionable.: "No matter how fair a bankruptcy judge is, his statutory duties give him a certain bias in a case, and the bankruptcy court as a result has been viewed by many as an unfair forum." H.R.REP. NO. 595, 95th Cong., 1st Sess. 88 (1978), reprinted in 1978 U.S.C.C.A.N. at 6050. Congress went on to note that "[d]eeper problems arise because of the inconsistency between the judicial and administrative roles of the bankruptcy judges. The inconsistency compromises his impartiality as an arbiter of bankruptcy disputes." *Id.* at 89, *reprinted* in U.S.C.C.A.N. at 6050. To rectify this problem, Congress limited the role of bankruptcy judges as administrators and mediators. *See, e.g.*, 11 U.S.C. s 341(c) (1994) ("The court may not preside at, and may not attend, any meeting under this section including any final meeting of creditors.").

The majority concludes that the judge need not have been recused from the fairness hearing, because the settlement negotiations he mediated were a judicial proceeding. I am not so certain. I agree that we are governed by *Liteky v. United States*, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994), and that if the settlement negotiations were a judicial proceeding, recusal was not required. I also agree that if the negotiations were a judicial proceeding, we must make a case-specific determination: A judge may become so involved in settlement negotiations as to warrant recusal even though the negotiations were judicial proceedings. See id. at ----, 114 S.Ct. at 1157 (noting that recusal may be warranted where bias stems from a judicial source if it amounts to "a deep-seated favoritism or antagonism that would make fair judgment impossible"). As the majority points out, Chief Judge Parker's involvement in this case was not substantial, and recusal is therefore not required unless the settlement negotiations were extrajudicial proceedings.

I part ways with the majority, however, when it comes to deciding whether the settlement negotiations the judge mediated were judicial proceedings. The majority concludes that they were, though its only explanation is to state that "Judge Parker's role in the negotiation process ... stemmed from three cases filed in his court [i.e., the assignment litigation]." I agree that if the negotiations were a legitimate part of the proceedings in the assignment litigation, they were judicial proceedings. Chief Judge Parker's judicial authority was limited to the assignment litigation, however, and I do not believe that he could conduct judicial proceedings with respect to Ahearn simply because it was somehow related to the assignment litigation.

Remember that the parties had not even filed Ahearn yet. Thus, any time the judge spent mediating that dispute--as opposed to the insurance cases filed in his court--was community service, not judging. [52]

The rules of civil procedure allow judges to participate in settlement conferences. See FED.R.CIV.P. 16(a)(5) (allowing courts to schedule conference "facilitating the settlement of the case"). Rule 16 settlement conferences are judicial proceedings and generally are not an adequate basis for recusal. *Cf. Liteky*, 510 U.S. at ----, 114 S.Ct. at 1157 (noting that judicial proceedings "can only in the rarest circumstances" form an adequate basis for recusal). The question is whether Chief Judge Parker mediated the settlement negotiations in the course of a rule 16 conference.

If the settlement negotiations he mediated were chiefly negotiations over the assignment litigation, and settling *Ahearn* was incidental to settling the assignment litigation, the negotiations probably amounted to a rule 16 conference. If, on the other hand, the primary object of the negotiations was to settle *Ahearn*, the negotiations do not fall within the bounds of rule 16. That rule allows judges to schedule conferences only to settle "the case," which surely must mean the case filed and pending before the judge. Rule 16 cannot permit a judge to order settlement conferences over cases that are not before him--that would be an exercise of power the Constitution does not permit. See U.S. CONST. art. III, § 2 (limiting judicial power to actual cases or controversies). Federal courts are not roving engines of justice careening about the land in search of

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[52]Certainly there can be no criticism of Judge Higginbotham's role. From the start, he served only as a mediator, not a judge. In facilitating agreement, he did precisely what a mediator is supposed to do.

wrongs to right. Rather, federal courts were designed to be much like all other courts: passive entities resolving only the quarrels which are properly put before them by interested parties and which are within the competence of courts in a tripartite system of constitutional government.

Haitian Refugee Ctr. v. Civiletti, 503 F.Supp. 442, 461 (S.D.Fla.1980), *modified*, 676 F.2d 1023 (5th Cir. Unit B 1982).

I seriously doubt that Chief Judge Parker was conducting settlement negotiations over the assignment litigation and only incidentally settled *Ahearn* along the way. If so, this is one of the more amazing examples of a tail wagging a dog. I recognize, however, that the content and nature of the settlement negotiations the judge mediated present a question of fact, and I therefore would remand to the district court for findings in this regard.

VIII. Article III Justiciability.

Finally, the majority simply fails to consider a number of difficult justiciability issues. While questions of Article III standing and variances in state law may seem somewhat rarefied, it is important to remember the central purpose of jurisdictional requirements--to keep us in our place. The constitutionally-assigned task of the federal judiciary is to resolve cases and controversies that Congress and the Constitution have authorized us to adjudicate. When we depart from that role by considering generalized grievances or private dispute resolution mechanisms, we quickly find ourselves acting more as legislative policymakers than as judges.

Failure to honor standing requirements, in particular, can result in devastating consequences for those we intend to help. As standing turns in large part on whether an individual has suffered an injury-in-fact, those who lack standing may be unaware that our legislative dalliances eventually will affect them; thus, they are unlikely to speak up for themselves.

This case presents a particularly egregious example, for the parties and the district court gerrymandered the class to exclude all those who were sufficiently concerned with their injuries to have filed suit. Thus, the class consists largely of people who are unlikely to monitor class counsel's performance or challenge the settlement. In a justice system that depends on robust adversarial presentations, that dynamic leaves the judiciary ill- equipped to evaluate the procedural and substantive fairness of the negotiations and eventual settlement.

This case shatters the constitutional limits placed on the authority of the federal courts by Article III, Section 2 of the United States Constitution. We are obligated to consider these issues, *sua sponte* if necessary, to assure ourselves that the district court properly exercised jurisdiction.[53] It is fairly obvious that here, the district court exceeded its jurisdiction in approving the class action settlement.

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[53]The Third Circuit pretermitted the jurisdictional issues raised in a nearly identical case because its decision to decertify the class disposed of the case in favor of the intervenors. *See Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 617, 623 (3d Cir.1996). Even in that case, one judge wrote separately to emphasize, *inter alia*, that the jurisdictional issues should have been reached. *See id.* at 635-38 (Wellford, J., concurring). The majority's decision to affirm certification in this case, however, obligates it to address--*sua sponte* if necessary--the troubling jurisdictional problems raised by the district court's approval of the settlement. Nevertheless, the majority has failed even to raise these issues, let alone consider them.

A. The Causes of Action.

The class action complaint alleges only personal causes of action against Fibreboard for money damages. [54] The majority agrees: "The central remedial and legal theory of each of the named plaintiffs [is] that Fibreboard is liable in tort for damages incurred due to exposure to Fibreboard asbestos." Maj.Op. at 975.[55] The district court also recognized that the complaint alleges in personam claims. [56] Thus, *Ahearn* is a case-- admittedly an extraordinary one--involving multiple, *in personam*, state-law causes of action aggregated by means of rule 23, the federal class action device.

B. The Basis for Subject-Matter Jurisdiction.

The majority does not discuss the basis for subject-matter jurisdiction. The plaintiffs and the defendants, in their joint appellate brief, assert that federal jurisdiction was available under 28 U.S.C. § 1332 (diversity) and 28 U.S.C. § 1335 (interpleader). The district court's published opinion relies on diversity alone as a basis for federal jurisdiction. *See Ahearn*

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[54]The counts alleged are (1) negligent failure to warn; (2) strict product liability; (3) breach of express and implied warranty; (4) concert of action and conspiracy; and (5) "all other viable claims." This last count consists of every "claim or cause of action" that the plaintiffs can assert "against Fibreboard."

[55]The majority also states that "*Ahearn* ... presents us with claims against a healthy company for personal injuries and a proposed settlement of those claims." Maj. op. at 983.

[56]The district court actually stated that "[the] claims were, prior to the settlement, *in personam* in character." This statement implies that, in the court's view, the settlement transformed the claims into something other than in personam claims.

v. Fibreboard Corp., 162 F.R.D. 505, 522 (E.D.Tex.1995). In supplemental conclusions of law filed on the same day, however, the district court claimed that federal jurisdiction also is proper under the interpleader jurisdiction statute.

Diversity of citizenship was an arguable basis for subject-matter jurisdiction. Statutory interpleader jurisdiction is not available here, because there is no res or common fund. *See Wausau Ins. Cos. v. Gifford*, 954 F.2d 1098, 1100-01 (5th Cir.1992).[57] Even if interpleader jurisdiction were present, the weighty Article III justiciability issues would still exist.

These Article III issues arise out of the application of *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), to this multi-state class action. As in cases

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[57]In *Wausau*, we were faced with "six insurance funds encompassing different periods during a four-year span." 954 F.2d at 1101. Furthermore, the legitimacy of the claims against each fund was not established. *Id.* Cautioning that "[i]nterpleader is not designed to solve all problems associated with multiparty litigation," *id.* (citing *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 535, 87 S.Ct. 1199, 1206, 18 L.Ed.2d 270 (1967)), we held: "Because the present case involves six separate funds and because it is unclear whether there are legitimate claims against each fund, we conclude that an identifiable fund as required for interpleader actions is not involved." *Id.*

In *Ahearn*, we are again faced with multiple funds--the policies issued by the two insurers, Continental and Pacific--and the legitimacy of the liabilities against the policies is not well-established--*i.e.*, the validity of all the class members' claims against Fibreboard has not yet been decided. Moreover, because of the potentially limitless liability under these comprehensive general liability policies, the ultimate scope of coverage cannot be determined until damages are awarded on each successful claim. The terms of the policies in *Wausau* at least limited coverage to a specific dollar amount; thus, the total possible liability was easily defined. Yet even there we held that interpleader jurisdiction was unavailable. It follows a fortiori from *Wausau* that such jurisdiction does not exist in *Ahearn*.

brought under the ordinary diversity jurisdiction statute, cases brought under statutory interpleader are governed by state substantive law, pursuant to the mandate of Erie. Thus, *Erie* applies to this class action regardless of whether federal jurisdiction is proper under ordinary diversity, interpleader, or both.[58]

C. Rule 23(e) Approval and Article III.

Federal Rule of Civil Procedure 23(e), [59] which requires that the dismissal or compromise of a class action be approved by a district court, triggers the inquiry into federal jurisdiction.

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[58]*See Griffin v. McCoach*, 313 U.S. 498, 503, 61 S.Ct. 1023, 1025-26, 85 L.Ed. 1481 (1941) (applying *Erie* and *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941) to federal statutory interpleader case); *Perkins State Bank v. Connolly*, 632 F.2d 1306, 1311 (5th Cir.1980) (stating that, with limited exceptions, "substantive state rules of decision generally govern federal interpleader proceedings"); *Bluff Creek Oil Co. v. Green*, 257 F.2d 83, 85 (5th Cir.1958) (applying *Erie* after characterizing § 1335 interpleader action as "just another diversity suit"); *Williams v. McFerrin*, 242 F.2d 53, 55 (5th Cir.1957) (applying Louisiana conflict of laws principles to case, per *Klaxon*, because "interpleader comes under the diversity jurisdiction of the federal courts"); *Whirlpool Corp. v. Ritter*, 929 F.2d 1318, 1320-21 (8th Cir.1991) (stating in *dictum* that *Klaxon* applies to suits brought under § 1335 "because the federal interpleader statute is merely a special brand of diversity jurisdiction") (citing *Griffin*, 313 U.S. at 503, 61 S.Ct. at 1025-26, and *Williams*, 242 F.2d at 55); 7 WRIGHT & MILLER § 1713 (1986) (stating that the *Erie* doctrine applies fully in both FED.R.CIV.P. 22 and § 1335 interpleader actions) (noting exceptions for certain procedural, remedial, and administrative matters--*e.g.*, pleading rules, the availability of injunctive relief, and attorneys' fees).

[59]This provision reads: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." FED.R.CIV.P. 23(E).

The act of approving--or disapproving--a class action settlement is an exercise of judicial power by a district court. [60]

Unlike a private settlement in an ordinary case, a class action settlement requires that a federal district court affirmatively exercise its adjudicative authority. Thus, a judicially approved federal class action settlement is a "judgment." [61] The underlying authority to enter such a judgment is, of course, expressly circumscribed by Article III, which limits the judicial power to "cases" and "controversies." U.S. CONST. art. III, § 2.

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[60]*Epstein v. MCA, Inc.*, 50 F.3d 644, 667 (9th Cir.1995), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. v. Epstein*, --- U.S. ----, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996); *see Evans v. Jeff D.*, 475 U.S. 717, 726-727, 106 S.Ct. 1531, 1536-1537, 89 L.Ed.2d 747 (1986) (referring to district court's rule 23(e) "power to approve or reject a [class action] settlement"); *see also In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 793 (3d Cir.) ("A judicially supervised and approved class action settlement, like a judicially supervised trial, is a means of hearing and determining judicially, in other words 'adjudicating,' the value of claims arising from a mass tort.") (quoting with approval Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L.REV. 779, 835 (1985) (footnote omitted)), *cert. denied*, --- U.S. ----, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995).

[61]*See Purcell v. BankAtlantic Fin. Corp.*, 85 F.3d 1508, 1511 (11th Cir.1996) (referring to "judgment" approving class action settlement), *White v. National Football League*, 836 F.Supp. 1508, 1510-11 (D.Minn.1993) (describing and entering "judgment" approving class action settlement), *aff'd*, 41 F.3d 402, 406-07 (8th Cir.1994) (referring to "judgment decree" and "consent judgment" approving class action settlement), *cert. denied*, --- U.S. ----, 115 S.Ct. 2569, 132 L.Ed.2d 821 and cert. denied, --- U.S. ----, 115 S.Ct. 2569, 132 L.Ed.2d 821 (1995); cf. *Matsushita*, --- U.S. at ---- - ----, 116 S.Ct. at 877-78 (treating class action settlement approved by state court as a state court judgment).

In approving the class action settlement, the district court purported to release--i.e., extinguish--all claims by class members based on Fibreboard's liability for its asbestos products. *See Ahearn*, 162 F.R.D. at 517 (stating that Fibreboard and the insurers would receive "total peace" in return for providing the global settlement monies). Because the court was exercising its Article III judicial power, it did not have the authority to release claims that did not constitute a valid case or controversy at the time it gave its approval.

There are cases either holding or suggesting that in a settlement, courts may release claims that they would lack "jurisdiction" to try. *See, e.g., Adams Extract Co. v. Pleasure Hours, Inc. (In re Corrugated Container Antitrust Litig.)*, 643 F.2d 195, 221 & nn. 39-40 (5th Cir.1981); *Epstein v. MCA, Inc.*, 50 F.3d 644, 661-64 (9th Cir.1995), rev'd on other grounds sub nom., *Matsushita Elec. Indus. Co. v. Epstein*, --- U.S. ----, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996); *Matsushita*, --- U.S. at ----, ---- - ----, 116 S.Ct. at 877, 879-90. All of these cases, however, refer to dimensions of jurisdiction other than the case-or-controversy requirement. For example, many of them involved federal courts' approving the release of state-law claims, or state courts approving the release of exclusively federal claims. *See, e.g., Corrugated Container*, 643 F.2d at 221 & nn. 39-40; *Epstein*, 50 F.3d at 661-64; *Matsushita*, --- U.S. at ----, 116 S.Ct. at 877. None of these cases has advanced the radical proposition that a federal court, in approving a class action settlement--*i.e.*, in the exercise of its Article III jurisdiction--can release claims not presenting a case or controversy.

Furthermore, courts often have used the "common nucleus of operative facts" test to determine whether unpled claims can be released. *See, e.g., Class Plaintiffs v. City of*

Seattle, 955 F.2d 1268, 1288 (9th Cir.), *cert. denied*, 506 U.S. 953, 113 S.Ct. 408, 121 L.Ed.2d 333 (1992); *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 34 (1st Cir.1991). This test is used for determining whether a court may exercise supplemental jurisdiction, and a federal court may exercise supplemental jurisdiction only over claims that are part of the same Article III case or controversy. *See* 28 U.S.C. § 1367(a) (1994); *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966).

Thus, the release-of-claims cases assume that the released claims are justiciable cases or controversies. Those cases do not challenge the key conclusion that a portion of a settlement is void if it purports to release non-justiciable claims.

D. The Class.

The plaintiff class of natural persons certified in this case--the Global Health Claimant Class--is indeed sweeping. [62]

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[62]The precise class definition is as follows:

(a) All persons (or their legal representatives) who prior to August 27, 1993 were exposed, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member or any other person), to asbestos or to asbestos-containing products for which Fibreboard may bear legal liability and who have not, before August 27, 1993, (i) filed a lawsuit for any asbestos related personal injury, or damage, or death arising from such exposure in any court against Fibreboard or persons or entities for whose actions or omissions Fibreboard bears legal liability; or (ii) settled a claim for any asbestos-related personal injury, or damage, or death arising from such exposure with Fibreboard or with persons or entities for whose actions or omissions Fibreboard bears legal liability;

(b) All persons (or their legal representatives) exposed to asbestos or to asbestos-containing products, directly or indirectly (including but

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By its terms, the class definition includes, *inter alia*, the following categories of persons:

(1) future children of persons exposed to asbestos ("future children");[63]

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[62](...continued)
not limited to exposure through the exposure of a spouse, household member or any other person), who dismissed an action prior to August 27, 1993 without prejudice against Fibreboard, and who retain the right to sue Fibreboard upon development of a nonmalignant disease process or a malignancy; provided, however, that the Settlement Class does not include persons who filed and, for cash payment or some other negotiated value, dismissed claims against Fibreboard, and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy; and

(c) All past, present and future spouses, parents, children and other relatives (or their legal representatives) of the class members described in paragraph (a) and (b) above, except for any such person who has, before August 27, 1993, (i) filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) or (b) above in any court against Fibreboard (or against entities for whose actions or omissions Fibreboard bears legal liability), or (ii) settled a claim for the asbestos-related personal injury, or damage, or death of a class member described in (a) or (b) above with Fibreboard (or with entities for whose actions or omissions Fibreboard bears legal liability).

[63]The future children purportedly bring "indirect" claims--e.g., claims for wrongful death--derived from the exposure to asbestos of the persons who will become their parents. Some states treat these claims as non-derivative. *See Adams v. U.S. (In re "Agent Orange" Prod. Liab. Litig.)*, 818 F.2d 201, 203 (2d Cir.1987), *cert. denied*, 484 U.S. 1004, 108 S.Ct. 695, 98 L.Ed.2d 647 (1988). Most of these claims are also unripe because the person exposed to asbestos--the future parent of the future child--is still alive.

(2) future spouses of persons exposed to asbestos ("future spouses");[64] and

(3) persons who have been exposed to asbestos, who have not manifested an asbestos-related disease, and who had not filed or had dismissed a lawsuit by August 27, 1993 ("exposure-only" claimants).

No person included in the first two categories meets the irreducible constitutional minimum of standing for any claim. Furthermore, some of the persons in the third category lack standing with respect to some or all of their claims. Thus, several of the claims asserted by these categories of persons present no justiciable case or controversy, and the district court therefore erred in deciding to hear them. The future children, for example, include "persons" who had not been conceived at the time the complaint was filed. [65] Common sense alone dictates the conclusion that non-existent persons cannot have standing to assert *in personam* causes of action for money damages. In more formal terms, these unconceived plaintiffs cannot prove injury-in-fact and thus cannot establish standing to assert their *in personam* tort claims. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) (defining injury-in-fact).

Similarly, future spouses--who may or may not already be born--are, by definition, not yet married to the exposed persons. Common sense once again dictates the conclusion that these persons--who have not been exposed to asbestos

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[64]The future spouses also purportedly bring indirect claims--e.g., loss of consortium. Again, some jurisdictions treat these claims as non- derivative. *See Adams*, 818 F.2d at 203.

[65]For simplicity, I restrict my analysis to persons not yet conceived.

themselves--have not yet been injured in fact because they currently have no relation to exposed persons.

Imagine, for example, the absurd hypothetical of a "person" from each of the first two categories filing individual lawsuits today in federal court--i.e., without resort to rule 23. I do not doubt that any federal court would dismiss their claims immediately for want of justiciability. We must not allow the aggregation of individual claims through the class action device to divert our attention from such a fatal defect.[66]

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[66]The rule 23(b)(3) class in the *Agent Orange* case was carefully defined to avoid future children and future spouses. The class definition read as follows:

> [T]hose persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides.... The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.

Ivy v. Diamond Shamrock Chems. Co. (In re "Agent Orange" Prod. Liab. Litig.), 996 F.2d 1425, 1429 (2d Cir.1993) (quoting *In re "Agent Orange" Prod. Liab. Litig. MDL No. 381*, 100 F.R.D. 718, 729 (E.D.N.Y.1983), *aff'd*, 818 F.2d 145 (2d Cir.1987), *cert. denied*, 484 U.S. 1004, 108 S.Ct. 695, 98 L.Ed.2d 647 (1988)), *cert. denied*, 510 U.S. 1140, 114 S.Ct. 1125, 127 L.Ed.2d 434 and *cert. denied*, 510 U.S. 1140, 114 S.Ct. 1126, 127 L.Ed.2d 434 (1994). This definition restricted the class to past and present spouses and already-born children, thus avoiding the jurisdictional anomalies presented by future spouses and future children. The appellees would have us believe that the federal courts routinely certify classes including future claimants; the authorities they cite belie that claim, however. In *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 393, 100 S.Ct. 1202, 1207, 63 L.Ed.2d 479 (1980), the class definition did include future claimants, but the district court had declined to certify the class; as a result, the Court never had occasion to consider the standing issues raised by the inclusion of such persons. Likewise, the district court in *Comer v. Cisneros*, 37 F.3d 775, 780, 796 (2d Cir.1994), had declined to certify a class

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Aside from these glaring defects, a more subtle problem exists with respect to the third category of persons that I defined above--i.e., the exposure-only claimants. Properly addressing the problem, however, requires a review of certain fundamental principles of Article III jurisdiction and their application to diversity cases.

E. *Standing.*

1. Standing in Relation to Causes of Action.

It is impossible to analyze standing without reference to a cause of action: "[S]tanding is gauged by the specific common-law, statutory or constitutional claims that a party presents." [67] Suppose, for example, that a public employer has

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[66](...continued)
including future claimants. Thus, the holding in *Comer* was merely that the purported class representatives--who were present claimants--had standing, not that the future claimants did.

Finally, *McArthur v. Scott*, 113 U.S. 340, 5 S.Ct. 652, 28 L.Ed. 1015 (1885), simply has nothing to do with this mass toxic tort class action. The portion of *McArthur* relied upon by the appellees discusses trusts and estates, as do the cases cited therein. *See id.* at 401-02, 5 S.Ct. at 673-74.

[67]*International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 77, 111 S.Ct. 1700, 1704, 114 L.Ed.2d 134 (1991); *see Catholic Social Serv. v. Shalala*, 12 F.3d 1123, 1125 (D.C.Cir.1994) ("[A] plaintiff's standing must be analyzed with reference to the particular claim made."); *see also Financial Insts. Retirement Fund v. Office of Thrift Supervision*, 964 F.2d 142, 146 (2d Cir.1992) (quoting *International Primate*, 500 U.S. at 77, 111 S.Ct. at 1704).

In *Louisiana Landmarks Soc'y v. City of New Orleans*, 85 F.3d 1119, 1122 n. 3 (5th Cir.1996), we stated that "[s]tanding is a concept distinct from the concept of private rights of action." The appellee in that case had failed to brief

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discriminated against an applicant for employment on the basis of race. Undoubtedly, such an allegation of injury would meet Article III's standing requirements for, e.g., a Fourteenth Amendment equal protection claim.

Nevertheless, that injury may not serve as the predicate for standing to assert any conceivable cause of action. For example, such an injury does not operate to confer standing on the applicant for a violation of the right to be free from unreasonable searches and seizures under the Fourth Amendment. For while he could show injury-in-fact with respect to his equal protection rights, he cannot show injury-in-fact with respect to his rights under the Fourth Amendment. See Lewis v. Casey, --- U.S. ----, ---- n. 6, 116 S.Ct. 2174, 2181-82 n. 6, 135 L.Ed.2d 606 (1996).[68]

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[67](...continued)
the implied cause of action issue raised by the appellants, asserting that the appellants had waived a "standing" argument in the district court. We expressed our puzzlement with the appellee's waiver argument by noting that standing and implied rights of action are not equivalent concepts and that, moreover, standing can never be waived, because it is jurisdictional. See id. Thus, *Landmarks* should not be read as implying that standing is unrelated to the causes of action alleged.

[68]The Court made this point explicitly:

> [S]tanding is not dispensed in gross. If the right to complain of one administrative deficiency automatically conferred the right to complain of all administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review. That is of course not the law. As we have said, "[n]or does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which

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Thus, standing analysis assumes, at a minimum, that the plaintiff has alleged a cause of action created to vindicate a legally protected interest. The cause of action alleged serves as a necessary frame of reference for the standing inquiry--hence the Court's explicit connection of standing and causes of action in *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 111 S.Ct. 1700, 114 L.Ed.2d 134 (1991):

> Standing does not refer simply to a party's capacity to appear in court. Rather, standing is gauged by the specific common-law, statutory or constitutional claims that a party presents. "Typically, ... the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication *of the particular claims asserted.*"[69]

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[68](...continued)
he has not been subject." *Blum v. Yaretsky*, 457 U.S. 991, 999, 102 S.Ct. 2777, 2783, 73 L.Ed.2d 534 (1982).

Casey, — U.S. at — n. 6, 116 S.Ct. at 2181-82 n. 6 (parallel citations omitted).

[69]500 U.S. at 77, 111 S.Ct. at 1704 (quoting *Allen v. Wright*, 468 U.S. 737, 752, 104 S.Ct. 3315, 3325, 82 L.Ed.2d 556 (1984)) (emphasis in original); *see Catholic Social Serv.*, 12 F.3d at 1125; *Howe v. Ellenbecker*, 8 F.3d 1258, 1261 (8th Cir.1993), *cert. denied*, — U.S. ----,4 S.Ct. 1373, 128 L.Ed.2d 49 (1994); *Financial Insts.*, 964 F.2d at 146-47; *see also United Food & Commercial Workers Int'l Union, Local 751 v. Brown Group, Inc.*, 50 F.3d 1426, 1428-29 (8th Cir.1995), *rev'd on other grounds*, — U.S. ----, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996); *cf. Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1514 (9th Cir.1992) ("Where ... Congress is the source of the purportedly violated legal obligation, we look to the statute to define the injury.")

(continued...)

In other words, standing analysis does not operate in a vacuum: The allegation of a cause of action frames the inquiry. *See Catholic Social Serv. v. Shalala*, 12 F.3d 1123, 1125 (D.C.Cir.1994). [70]

In diversity cases, pursuant to the Erie doctrine, state law defines the substantive causes of action. In an ordinary case, we rarely have to confront the interaction between Erie and federal standing analysis. Regardless of what else one can say about Ahearn, however, no one can fairly accuse it of being an ordinary case.

2. Injury-in-Fact.

In Lujan v. Defenders of Wildlife, the Supreme Court set out the test for Article III standing as follows:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally protected interest which is (a) concrete and particularized; and (b) "actual or imminent, not 'conjectural or hypothetical.' " Second, there must be a causal

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[69](...continued)
(quoting *International Primate*, 500 U.S. at 77, 111 S.Ct. at 1704).

[70]I do not suggest that we look to the merits of the cause of action or determine whether the cause of action is valid (in the sense of determining whether the plaintiff ultimately would win). Rather, we must examine the pleadings to determine what cause of action the plaintiff has alleged and whether his allegations of injury, in the context of that cause of action, satisfy Article III standards.

> connection between the injury and the conduct complained of--the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

504 U.S. at 560-61, 112 S.Ct. at 2136 (footnote and citations omitted). For the purposes of this case, we need focus only on the first prong of this standard: injury-in-fact.

> The *Lujan* injury-in-fact test consists of two sections:
> (1) the "invasion of a legally protected interest"; and
> (2) the criteria of
> (a) concreteness and particularity; and
> (b) actuality or imminence.

The failure of a plaintiff fully to meet the requirements of both sections constitutes the failure to establish the irreducible constitutional minimum of standing. Thus, to survive the Article III inquiry, a plaintiff must make--*inter alia*--a showing that he had a legally protected interest that has been invaded. The failure to make such showing would be fatal to his attempt to establish Article

3. Effect of State Law.

The second part of the *Lujan* injury-in-fact test is governed purely by federal law (even in diversity cases), for no pronouncement of state law can affect a federal court's determination of whether an invasion of a legally protected interest is, e.g., sufficiently concrete and particularized to satisfy

Article III. Similarly, no decision of state law can affect a federal court's determination of whether such an invasion is sufficiently actual or imminent to satisfy Article III.

In diversity cases, however, the first part of the *Lujan* injury-in-fact test is not completely independent of state law. The concept of "invasion of a legally protected interest" immediately invites the question of who or what protects the interest. In an ordinary, non-diversity case, federal law is the source of substantive rights and of causes of action designed to vindicate those rights. In diversity cases, it is state law that creates legally protected interests and provides causes of action to vindicate them.

This conclusion cannot be avoided by chanting the mantra that federal law cannot depend on state law. Under *Erie*, the judgment of a federal court depends on state substantive law in a diversity case. The definition of a legally protected interest--as well as the provision of a cause of action to vindicate that interest--is a matter of substantive law. [71] If the

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[71] In a recent case interpreting the Warsaw Convention, the Supreme Court had occasion to consider whether the question of who may bring suit is substantive or procedural. *See Zicherman v. Korean Air Lines Co.*, --- U.S. ----, ----, 116 S.Ct. 629, 634, 133 L.Ed.2d 596 (1996). The Court was interpreting Article 24 of the Convention, which leaves to domestic law the issues of who is entitled to sue and what types of damages they may recover. *See id.* at ---- - ----, 116 S.Ct. at 633-34. The Court concluded:

> The most natural reading of [Article 24] is that, in an action brought under Article 17, the law of the Convention does not affect the substantive questions of who may bring suit and what they may be compensated for.... It does not seem to us that the question of who is entitled to a damages award is procedural.

Id. at ----, 116 S.Ct. at 634 (emphasis added). Thus, the question of who may bring suit is a question answered by substantive law--in a diversity case, state

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federal injury-in-fact test articulated in *Lujan* depends on the definition of a legally protected interest--and it does--then the outcome of that federal inquiry depends in part on how state law defines that interest.

Moreover, when a state has declined to create a given cause of action, it has decided not to accord legal protection to a particular interest. Therefore, if a given exposure-only cause of action embraced in the settlement is not founded on a substantive right, [72] it is impossible for a person asserting that claim to prove injury-in-fact. This is so because the injury-in-fact test requires proof of the invasion of a legally protected interest. *See Lujan*, 504 U.S. at 560, 112 S.Ct. at 2136; *cf. International Primate*, 500 U.S. at 77, 111 S.Ct. at 1704 (stating that substantive claim is a predicate for standing analysis). [73]

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[71] (...continued)
substantive law. This is not to say that standing in federal court is purely an issue of state law in a diversity case; rather, the role of state law is to identify, within federal constitutional limits, the persons who have legally protected interests and what those interests are.

[72] This is equivalent to saying that the law of the relevant state (determined through a choice of law analysis) does not authorize that exposure-only cause of action.

[73] Cases that opine in broad language that state law cannot affect the diversity jurisdiction of the federal courts are inapposite. *Cf., e.g., Begay v. Kerr-McGee Corp.*, 682 F.2d 1311, 1315 (9th Cir.1982). In *Begay*, the court did opine that state law cannot create or enlarge federal jurisdiction, but that statement must be viewed in context.

The *Begay* court faced a state statute that granted a substantive right and then purported to state that the sole remedy for violation of the right was an administrative claim over which a state commission had exclusive jurisdiction.

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4. Choice of Law Analysis.

The causes of action alleged in *Ahearn* are state-law causes of action brought on the basis of diversity jurisdiction. Standing must be measured by the cause of action pled, *see International Primate*, 500 U.S. at 77, 111 S.Ct. at 1704; therefore, the standing of the exposure-only plaintiffs must be gauged by the causes of action they assert.

All of the exposure-only claimants have a common predicate for their causes of action: Their claims, by definition, are based on mere exposure to asbestos, not on an extant injury caused by exposure to asbestos. The states vary, however, in the degree to which they recognize a cause of action predicated on exposure alone--i.e., they vary in the degree to which they legally protect an interest in being free from exposure to asbestos.

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[73](...continued)
The court responded that a state law, having conferred a substantive right, cannot determine whether a federal court sitting in diversity has jurisdiction over a claim based on that right. *See id.* at 1315-17. Rather, the proper inquiry in such a case is whether the complaint stated a claim upon which relief could be granted. *See id.* at 1315, 1317, 1320.

This analysis does not apply to the Article III justiciability issues raised in *Ahearn*. The existence vel non of a cause of action is a factor that the Supreme Court has incorporated into the Article III standing inquiry. *See Lujan*, 504 U.S. at 560, 112 S.Ct. at 2136. Reinforcing this approach is the unambiguous recognition by the Court that we are to measure standing according to the particular common-law, statutory, or constitutional claim asserted. *See International Primate*, 500 U.S. at 77, 111 S.Ct. at 1704. Thus, in diversity cases, whether a state-law cause of action exists *at all* is a jurisdictional issue insofar as it relates to standing and injury-in-fact, not an issue of whether a claim for relief has been stated.

In Pennsylvania, for example, "asymptomatic pleural thickening is not a compensable injury which gives rise to a cause of action." *Simmons v. Pacor, Inc.*, 543 Pa. 664, 674 A.2d 232, 237 (1996). Pennsylvania does not recognize, in the absence of manifest injury, a legally protected interest either in (1) being free from the increased risk of cancer because of exposure to asbestos or in (2) being free from present emotional distress resulting from exposure to asbestos (i.e., distress caused by the fear of contracting cancer). *See id.* 674 A.2d at 237-38. [74] Consequently, because Pennsylvania does not legally protect those interests, a plaintiff asserting such causes of action could

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[74]Despite this unambiguous holding, the Supreme Court of Pennsylvania has allowed plaintiffs to recover medical monitoring costs for exposure to asbestos. *See Simmons*, 674 A.2d at 239-40. The court stated that such costs were properly awarded for meritorious exposure-only cases but that damages for increased risk and fear of cancer were not authorized. *See id.* 674 A.2d at 239-40.

There are two ways to analyze the phenomenon of exposure-only causes of action. First is the monolithic view--*i.e.*, that there is only a single cause of action based on exposure to asbestos, for which there are multiple remedies (some of which may not be available). Second is the "polylithic" view (for lack of a better word), that there are multiple causes of action for exposure to asbestos (some of which may not be available)--*i.e.*, there is one cause of action for increased risk of cancer, one cause of action for medical monitoring costs, etc.

It is largely irrelevant which of these two models is more elegant from a conceptual standpoint. What is important--indeed, determinative--for our inquiry is which of the two each state has adopted. Pennsylvania's high court unambiguously has held that Pennsylvania law supports no cause of action for increased risk of cancer or for present emotional distress arising from the fear of cancer. Thus, the court's statement about medical monitoring damages is best viewed as the authorization of a distinct cause of action for medical monitoring expenses. Reading the opinion otherwise would defy its plain language regarding Pennsylvania's nonrecognition of increased risk and emotional distress causes of action.

not possibly establish injury-in-fact under the standing test announced in *Lujan*--i.e., he cannot demonstrate the invasion of a legally protected interest.

States other than Pennsylvania also have declined to recognize all of the exposure-only causes of action embraced in the instant global settlement.[75] Such unauthorized claims are not founded upon legally protected interests. Thus, because those claims cannot properly be before an Article III court, they cannot be extinguished by the *Ahearn* global settlement. Therefore, because the global settlement purports to extinguish those claims, reversal or vacatur is required.

It was necessary to conduct a choice of law analysis to determine the answer to the threshold question of standing in this case. More specifically, the district court should have conducted the choice of law analysis to determine whether every class member alleged the invasion of a legally protected interest--per the *Lujan* injury-in-fact test--with respect to each claim they asserted. The failure to do so resulted in the district

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[75] *See, e.g., Burns v. Jaquays Mining Corp.*, 156 Ariz. 375, 752 P.2d 28, 29-31 (Ct.App. 1987) (holding that subclinical asbestos-related injury is not sufficient to support cause of action), *review dismissed*, 162 Ariz. 186, 781 P.2d 1373 (1989); *DeStories v. City of Phoenix*, 154 Ariz. 604, 744 P.2d 705, 707-11 (Ct.App.1987) (same); *Mergenthaler v. Asbestos Corp. of Am.*, 480 A.2d 647, 651 (Del.1984) (holding that present physical injury caused by exposure to asbestos is "essential element" of claims for mental anguish and medical monitoring costs); *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187, 192 (Ky.1994) (requiring manifestation of asbestos-caused injury before recognizing existence of cause of action for negligence based on exposure to asbestos); *Larson v. Johns-Manville Sales Corp.*, 427 Mich. 301, 399 N.W.2d 1, 2 (1986) (holding that cause of action for asbestosis accrues upon discovery of disease, not at time of exposure to asbestos); *Locke v. Johns-Manville Corp.*, 221 Va. 951, 275 S.E.2d 900, 904-06 (1981) (holding that injury does not occur upon exposure to asbestos, but rather upon development of disease).

court's exercising its powers over claims not presenting a case or controversy--i.e., in the absence of Article III jurisdiction.[76]

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[76] The appellees cite a legion of cases indiscriminately--and in most cases without sufficient analysis--for the proposition that the exposure- only claims present a case or controversy. These cases, for one reason or another, are insufficient to overcome the force of *Lujan* and *International Primate*.

For example, the appellees cite *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978), as an example of a case where the Supreme Court found exposure to a harmful substance a sufficient injury-in-fact for standing purposes. The plaintiffs sought a declaratory judgment that a federal statute capping liability for nuclear accidents had violated their constitutional rights. *See id.* at 67, 98 S.Ct. at 2627. Three justices wrote separate concurrences expressing their conclusions that the dispute in that case was not within the district court's jurisdiction. *See id.* at 94-103, 98 S.Ct. at 2641-46 (concurring opinions of Justice Stewart, then-Justice Rehnquist, and Justice Stevens). The majority's standing analysis appeared to focus on environmental and aesthetic injuries unconnected to the claims asserted by the plaintiffs, which were claims for violations of the Due Process and Takings Clauses of the Fifth Amendment. *Compare id.* at 69, 98 S.Ct. at 2628 (claims alleged in complaint) with id. at 72-74, 98 S.Ct. at 2629-31 (injuries alleged in complaint).

That methodology--analyzing injury unanchored by the substantive claim asserted--is no longer available to us in light of *Lujan* and *International Primate*. In fact, the analysis advanced by the *Duke Power* majority is logically inconsistent with the Supreme Court's modern standing framework, embodied primarily in *Lujan* and enhanced by the unanimous directive in *International Primate*. Given that irreconcilable inconsistency, we have no choice but to follow the Court's more recent pronouncements.

Helling v. McKinney, 509 U.S. 25, 28, 113 S.Ct. 2475, 2478, 125 L.Ed.2d 22 (1993)--a case not cited by the appellees--is not on point, because the plaintiff alleged *present* injuries based on exposure to an alleged toxin (second-hand tobacco smoke). *See also Georgine*, 83 F.3d at 636 (Wellford, J., concurring). As a result, the Supreme Court never reached the issue of standing based on mere exposure to a toxin.

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[76](...continued)

In Agent Orange, the Second Circuit did not mention either *Lujan* or *International Primate* in stating that the exposure-only plaintiffs had sustained an " 'injury in fact.' " *See Agent Orange*, 996 F.2d at 1434 (relying only on *Duke Power*). Although I admire the Second Circuit's handling of the massive Agent Orange litigation, I must respectfully disagree with its analysis that exposure-only claimants in that litigation met Article III's requirements. Other than *Duke Power*, the court appeared to rely only on cases involving the interpretation of the term "injury" in insurance policies. *See id.* These cases, however, are not authoritative with respect to the manner in which "injury-in-fact" is defined for Article III purposes. *But see id.* The Supreme Court's recent guidance in *Lujan*, on the other hand, is dispositive of that definitional issue.

The appellees cite several bankruptcy cases to support their exposure-only theory--*e.g.*, *In re UNR Indus.*, 20 F.3d 766, 770-71 (7th Cir.), *cert. denied*, --- U.S. ----, 115 S.Ct. 509, 130 L.Ed.2d 416 (1994); *Findley v. Blinken (In re Joint E. & S. Dist. Asbestos Litig.)*, 129 B.R. 710, 834-37 (E. & S.D.N.Y. and Bankr.S.D.N.Y.1991), *vacated*, 982 F.2d 721 (2d Cir.1992), modified on reh'g, 993 F.2d 7 (2d Cir.1993); *Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig. (MDL 926))*, No. CV 92-P-10000-S, Civ.A. No. CV94-P-11558-S, 1994 WL 114580, at *1 (N.D.Ala. Apr. 1, 1994). On its face Article III does not apply to bankruptcy courts, which Article I courts. *See Rohm & Hass Texas, Inc. v. Ortiz Bros. Insulation, Inc.*, 32 F.3d 205, 210 n. 18 (5th Cir.1994). Because of the statutory scheme requiring that matters be referred to bankruptcy courts by district courts, however, the jurisdiction of the bankruptcy courts may be limited by Article III. *See, e.g., In re Interpictures, Inc.*, 86 B.R. 24, 28-29 (Bankr.E.D.N.Y.1988); John T. Cross, *Congressional Power to Extend Federal Jurisdiction to Disputes Outside Article III: A Critical Analysis from the Perspective of Bankruptcy*, 87 NW.U.L.REV. 1188, 1197-98 (1988).

If Article III does not apply to bankruptcy courts, the cited cases are plainly distinguishable. If it does apply, the reasoning of those cases is erroneous. The two district court cases do not cite to *Lujan* or *International Primate*. The Seventh Circuit's decision in *UNR* does cite to the former, but only in a conclusionary fashion and without any in-depth analysis.

F. Erie, Diversity, and Article III.

The majority's failure to raise and address the Article III issues is directly contrary to *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945), and *Angel v. Bullington*, 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed. 832 (1947). *In Guaranty Trust*, the Court faced the question of whether a state statute of limitations barring a class action was to be applied by a federal court sitting in diversity. *See Guaranty Trust*, 326 U.S. at 100-01, 65 S.Ct. at 1465-66. The Court expressly stated that *Erie* implicates the jurisdiction of Article III courts: "Our starting point must be the policy of federal jurisdiction which *Erie R. Co. v. Tompkins* embodies." *Id.* at 101, 65 S.Ct. at 1466 (citation omitted).

Recognizing that the *Erie* doctrine "[i]nevitably" applies to suits in equity, the Court framed the issue presented as follows:

> Is the outlawry, according to State law, of a claim created by the States a matter of "substantive rights" to be respected by a federal court of equity *when that court's jurisdiction is dependent on the fact that there is a State-created right*, or is such statute of "a mere remedial character" which a federal court may disregard?

Id. at 107-08, 65 S.Ct. at 1469 (citation omitted) (emphasis added). Thus, the Court explicitly recognized that the viability of a state- law cause of action was an essential predicate of diversity jurisdiction.

The Court's holding in *Guaranty Trust* was unambiguous:

> Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law.

Id. at 110, 65 S.Ct. at 1470. Thus, a state's decision to limit the life of a state-created cause of action must be respected by federal courts sitting in diversity. It is equally plain--indeed, it follows a *fortiori*-- that when a state has declined to give life to a cause of action at all, federal courts sitting in diversity also must refuse to entertain that cause of action.

In fact, we have interpreted a decision of the Supreme Court as specifically stating that federal courts sitting in diversity must not entertain diversity actions that are unavailable under state law. See *Kuchenig v. California Co.*, 350 F.2d 551, 556 (5th Cir.1965) (interpreting *Angel*), *cert. denied*, 382 U.S. 985, 86 S.Ct. 561, 15 L.Ed.2d 473 (1966). In deciding whether indispensability of a party was a matter governed by state or federal law in a diversity case, we applied an analysis in *Kuchenig* that closely parallels appropriate the *Erie*/standing analysis in *Ahearn*.

We first noted that "every court that has dealt with th[at] issue at all seems to have treated it, appropriately in our view, as a run-of-the-mine [sic] *Erie* problem, requiring the usual balancing of substantive and procedural elements." *Kuchenig*, 350 F.2d at 555. We stated further:

> [I]ndispensability, while not properly regarded as a jurisdictional issue, is closely related to jurisdiction, *and may act to defeat diversity jurisdiction* .... [R]ules of joinder depend on the substantive rights and liabilities of the parties, present and absent. In diversity actions, these substantive rights and liabilities are creatures of state law.

Id. at 555-56 (footnotes and citations omitted, emphasis added). We thus recognized an inevitable relationship, in diversity cases, between state substantive law and federal jurisdiction. We also noted that this relationship was not confrontational, but symbiotic: "Professor [Charles Alan] Wright characterizes the conflict in these cases as 'more apparent than real': state law determines the interests of the parties; federal law determines whether these state-created rights render a missing person indispensable." *Id.* at 556.[77]

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[77]Critically, we modified Professor Wright's apparent conflict formulation in one critical respect: "This short-hand formulation must at least be qualified insofar as it leaves room for a federal court to run afoul of *Angel v. Bullington* by entertaining diversity actions unavailable under state law." *Id.* (citation omitted). Professor Wright had acknowledged this limitation, referring to a prominent district judge's articulation of it: " 'Judge Wyzanski carefully points out the limitation that if, as a matter of substantive law, a state does not recognize that a plaintiff has a particular right of action unless he joins with him certain others, then the federal court in a diversity action is precluded from giving a plaintiff who fails to join those others an opportunity to proceed as though alone he had a substantive right.' " *Id.* (quoting 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 511 (1964 pocket part) (Wright ed. 1961)).

This approach to indispensability of a party--a matter "closely related to jurisdiction" that "may act to defeat diversity jurisdiction," *id.* at 555-- parallels the approach I have applied above in relation to standing. State law determines the substantive rights and interests of the exposure-only claimants. When a state has conferred a substantive right, federal law determines whether persons asserting such a right meet Article III requirements.

When a state has not conferred such a right, it is not within the power of a federal court to entertain that action in diversity. *See id.* at 556. The district court's diversity jurisdiction in this multi-state class action depended on the existence of state-created causes of action. *See Guaranty Trust,* 326 U.S. at 107-08, 65 S.Ct. at 1469 (stating that a federal court's diversity jurisdiction is "dependent on the fact that there is a State-created right"). In order to determine whether it had jurisdiction over all of the claims released in the class action settlement, the district court had to conduct a choice of law inquiry to determine which states' laws applied to which causes of action. Any claims not authorized by state law should have been explicitly excised from the settlement. The adjudication by the district court of those claims violated Article III limits on that court's jurisdiction.

Under these circumstances, we have no discretion: We must reverse or vacate the judgment approving the class action settlement. In reviewing the approval of a class action settlement, we may not modify the terms of the settlement but must approve or disapprove it in its entirety. *Cotton v. Hinton,* 559 F.2d 1326, 1331-32 (5th Cir.1977).

The reason for this rule is straightforward: Class action settlements often include delicate compromises, the disruption

of which would lead one or more of the parties to reconsider the wisdom of the settlement. Therefore, if an appellate court negates part of a class action settlement-- e.g., because of justiciability problems--it would have to vacate or reverse and remand for further proceedings. It could not simply excise the objectionable portion of the settlement and uphold the remainder as a viable settlement. *See id.*

IX. Summary and Conclusion.

Unencumbered by legislative safeguards and shedding nearly every judicial protection, the district court enacted a novel, untested tort reform package. As a result, Fibreboard's victims find themselves guinea pigs in a dubious (and legally unfounded) experiment.

The *only* protection accorded the class was a rule 23(e) fairness hearing. The district court also appointed a guardian *ad litem* to represent absent class members, but he did so only after class and defense counsel had completed the settlement. Thus, class members received absolutely no structural or procedural protections; instead, they had to rely on an after-the-fact review of the settlement's substance.

The district court and the guardian *ad litem* undertook that task diligently, but an after-the-fact substantive review is far too little, far too late. The court cannot conduct a trial in order to avoid one; nor can it turn back the clock and appoint different counsel to renegotiate the settlement fairly. Thus, the extent to which class counsel's numerous conflicts and Fibreboard's stacking of the deck actually affected the final settlement is unknowable. As Fibreboard entered the negotiations in constructive bankruptcy and left with more than

ninety-five percent of its assets intact, however, there is reason to be skeptical.

The effect of replacing the tort system with an administrative processing center is equally hard to ascertain, for judges lack legislative fact-finding and investigative capabilities. *If* the trust proves to be funded adequately and managed fairly, it *might* process claims more efficiently than the courts, reducing transaction costs and providing plaintiffs with faster and more reliable recovery. As such a reduction in transaction costs would generate a surplus for Fibreboard and the class, Fibreboard *might* deserve to walk away with over $200 million in remaining assets.

On the other hand, the trust might attempt to impose arbitrary limits similar to those of the *Georgine* trust and stonewall plaintiffs' counsel who protest, forcing them to endure a tedious series of procedural delays before their clients finally receive a day in court. The trust might also be inadequately funded, as was the Dow Corning settlement, leaving plaintiffs scraping for what little they can get while bureaucrats struggle to hold on to their jobs.

In short, we simply do not know what the courts have wrought. What we do know is that this "reform" involves denial of established constitutional rights; relaxation of already lax ethical rules; extinguishing of claims that we have no power to adjudicate, much less abolish; and a significant likelihood of collusion between the defendant and the class counsel.

I respectfully dissent from the majority's refusal to reverse--or veto--certification of this no-opt-out, mass-tort, settlement-only, futures-only class action.

APPENDIX E

Gerald **AHEARN**, James Dennis, Charles W. Jeep, James Ellison and William James Mitchell, on Behalf of Themselves and Others Similarly Situated, Plaintiffs,

V.

FIBREBOARD CORPORATION and Bethlehem Steel Corporation, Defendants, Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company and Pacific Indemnity Company, Defendant-Intervenors. Owens-Illinois, Inc. on Behalf of Itself and Others Similarly Situated, Additional Counterclaim Defendant. Civ. A. No. 6:93cv526., United States District Court, E.D. Texas, Tyler Division. July 27, 1995.

ROBERT M. PARKER, Circuit Judge.

This action was filed to obtain judicial approval of a class settlement (the "Global Settlement") which, if finally approved, will resolve all future [1] asbestos-related personal injury claims against Fibreboard Corporation ("Fibreboard"), and a longstanding dispute between Fibreboard and two of its insurers, Continental Casualty Company ("Continental") and Pacific Indemnity Company ("Pacific") (Continental and Pacific

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[1]Throughout this opinion, a "future claim" means a claim by a Global Health Claimant Class member covered by the Global Settlement Agreement. The Global Health Claimant Class essentially consists of all persons having a claim arising out of exposure to asbestos or asbestos-containing products for which Fibreboard may bear legal liability, where that exposure occurred prior to August 27, 1993, and where the claim had not been filed as a lawsuit or settled as of August 27, 1993. The precise class definition is set out in detail in the Judgment Regarding Class Certification.

are sometimes referred to collectively as the "Insurers") regarding the scope and extent of its insurance coverage available to Fibreboard to cover its asbestos liabilities. The agreements now before the Court for approval reflect a settlement among parties who have aggressively asserted and controverted the rights and claims that will be finally compromised and settled if the Court enters a final judgment. The principal parties to this litigation are the following: Gerald Ahearn, James Dennis, Charles W. Jeep, James Ellison and William James Mitchell, the class representatives of the plaintiff and defendant asbestos health claimant classes in this action (the "Global Health Claimant Class," or the "Class"); Fibreboard, which manufactured and distributed asbestos-containing products, principally asbestos insulation, from the 1920s until 1971; Continental, CNA Casualty Company of California and Columbia Casualty Company, which issued general liability policies to Fibreboard; Pacific, which Fibreboard alleges issued it a general liability policy; Owens-Illinois, Inc. ("Owens-Illinois"), the class representative of a defendant class of third-party claimants (the "Global Third-Party Claimant Class"); Bethlehem Steel Corporation ("Bethlehem"), the class representative of a defendant class of certain employers and insurers (the "Longshore Defendant Class"); Esteban Yanez Ortiz, Marion Behee, Paul Cochran, Edee Cochran, Ida Beck, John R. Allgood, Henry Evers and Lester E. Taylor (the "Ortiz Intervenors"), intervenors represented by the law firm of Baron & Budd, who have objected to this settlement; and James Flanagan and David H. Middleton (the "Flanagan Intervenors"), intervenors represented by the Maritime Asbestos Legal Clinic, a Division of the Jaques Admiralty Law Firm, who have objected to this settlement.

OVERVIEW

This action is the latest installment in the continuing saga of asbestos- related personal injury litigation against Fibreboard. If the Global Settlement is finally approved, it will be the last. The parties to the Global Settlement (the "Settling Parties") agreed to the settlement because each found the Global Settlement preferable to the alternatives. Under the Global Settlement, Fibreboard will survive with its assets intact; the Global Health Claimant Class members will be better compensated than if Fibreboard were bled dry in the tort system; and the Insurers will rid themselves once and for all of a potentially ruinous liability. The only real loser under the Global Settlement is the asbestos litigation industry--the army of lawyers, consultants, and experts of every stripe--which has historically consumed the lion's share of the funds expended by asbestos defendants and their insurers in dealing with their asbestos liabilities. [2]

Without the Global Settlement, Fibreboard's chances of survival range from fair to nil, depending on the outcome of its insurance dispute. All Global Health Claimant Class Members, but especially those whose claims mature far in the future and those who were first exposed to Fibreboard's asbestos-containing products after 1959, face a serious risk of receiving

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[2] The Asbestos Litigation Industry was not without a voice in these proceedings. The Jaques firm, which represents the Flanagan Intervenors, purports to have an inventory of thousands of unfiled claims which allegedly would be affected by approval of the Global Settlement to the detriment of the firm. One of that firm's primary objections to the Global Settlement is that it would limit attorneys' fees to 25% of a claimant's recovery under the Global Settlement rather than a higher contractual contingent fee.

little or no compensation from Fibreboard without the settlement. The prerequisites of Rule 23(a) have been met. Mandatory class treatment is proper under the plain language of Rule 23(b)(1)(B). The only real obstacle the Global Settlement faces is its relative novelty. It remains to be seen whether Rule 23 will finally be determined to be flexible enough to embrace such a case. Put another way, the primary question presented by this case is whether the courts can provide a forum wherein a business plagued with continuing mass tort liability can negotiate a fair and final resolution the problem, or whether the courts' competence is limited to parceling out the corpse in bankruptcy.

BACKGROUND AND SETTLEMENT NEGOTIATIONS

A. Asbestos Litigation

Generally Asbestos-related personal injury and wrongful death litigation began in the courts of East Texas in the late 1960s. The first modern-day asbestos-related personal injury case in this country was brought in this Court in 1967 by Claude Tomplait against Fibreboard and other defendants. Through the late 1970s, plaintiffs' counsel around the country crafted theories of liability against the asbestos defendants they had identified. Plaintiffs' counsel conducted discovery, assembled a mass of documents bearing on liability that are now well known to every experienced asbestos judge, and identified the various medical conditions that could be forensically attributed to asbestos exposure. By the mid-1980s, the fundamental legal theories and liability cases against the early defendants, including Fibreboard, had been established, and litigation against these companies intensified dramatically.

Facing enormous liabilities and overwhelming defense costs, many defendants ended up in bankruptcy, including a number of companies previously consideredto be immune from financial difficulty. See In re Asbestos Products Liability Litigation, 771 F.Supp. 415, 420 (J.P.M.L.1991). Beginning in 1982 with Unarco Industries, Inc. and Johns-Manville, Inc. the list of corporate asbestos bankrupts now includes such defendants as Celotex Corporation, Eagle- Picher Industries, Inc., H.K. Porter Company, Inc., Keene Corporation, National Gypsum Company, Forty-Eight Insulations, Inc., and Raymark Industries, Inc.

As asbestos-related personal injury litigation mushroomed in the 1980s, asbestos dockets across the country grew exponentially, and plaintiffs in many jurisdictions began to face substantial delays in having their claims resolved. Transaction costs outpaced compensation to victims. Rand Corporation studies in 1983 through 1985 found that only 37% to 39% of money paid by asbestos defendants actually went to victims, with 61% to 63% consumed by transaction costs. Institute for Civil Justice Annual Report, April 1, 1990-March 31, 1991 (RAND).

By 1990, the situation had reached critical proportions. In September 1990, Chief Justice Rehnquist appointed a panel, the Judicial Conference Ad Hoc Committee on Asbestos Litigation ("Asbestos Ad Hoc Committee"), to study asbestos litigation and make recommendations. In November 1990, eight federal district judges with significant asbestos experience sent a letter to the Judicial Panel for Multidistrict Litigation ("MDL Panel"). They urged the MDL Panel to reverse its several prior rulings declining requested MDL transfers, and asked that the

MDL Panel consolidate all federal asbestos litigation in a single judicial district. These judges argued that consolidation would, among other things, "facilitate global settlements," and allow the transferee court to "fully explore ... national disposition techniques such as classes and sub- classes under Rule 23."

In March 1991, the Asbestos Ad Hoc Committee issued its report. The report has been described as a "ringing condemnation" of the treatment of asbestos claims in the tort system. See Georgine v. Amchem Prods., 157 F.R.D. 246, 265 (E.D.Pa.1994). The Asbestos Ad Hoc Committee stated: "[T]he [asbestos] situation has reached critical dimensions and is getting worse. What has been a frustrating problem is becoming a disaster of major proportions to both the victims and the producers of asbestos products, which the courts are ill-equipped to meet effectively." Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation ("Asbestos Ad Hoc Committee Report") at 2 (1991). The Asbestos Ad Hoc Committee also expressed its hope that some alternative dispute resolution mechanism for processing asbestos claims could be fashioned. Id. at 14. It concluded that: "The volume and complexity of asbestos cases have resulted in the violation of a basic tenet of American justice and the spirit of the Civil Justice Reform Act of 1990: speedy and inexpensive resolution of cases." Id. at 10

On July 29, 1991, the MDL Panel issued an order transferring all federal personal injury asbestos litigation to Judge Weiner of the Eastern District of Pennsylvania for coordinated or consolidated pretrial proceedings. In re Asbestos Products Liability Litigation, 771 F.Supp. 415. The MDL Panel voiced its hope that the MDL transfer might foster

global settlements of the "asbestos mess," noting that transfer "offer[s] a great opportunity to all participants who sincerely wish to resolve these asbestos matters fairly and with as little unnecessary expense as possible." Id. at 424. At the time of the MDL transfer, almost 30,000 asbestos-related personal injury claims were pending in the federal courts, with two times that number pending in the state courts. Id. at 416, 421.

After the MDL transfer, Judge Weiner appointed plaintiffs' and defendants' steering committees for the MDL litigation, the members of which included Ronald Motley, of Ness Motley, as one of the co-lead counsel of the Plaintiffs' Steering Committee; Steven Kazan, of the law firm Kazan, McClain, Edises & Simon, as a member of that committee; and Stephen M. Snyder, [3] counsel for Fibreboard, as a member of the Defendants' Steering Committee. One of the tasks of the steering committee was to attempt to solve the asbestos crisis on a global basis.

Settlement negotiations began between the Plaintiffs' and Defendants' Steering Committees in the MDL litigation. The parties made substantial efforts at global negotiations involving all plaintiffs and all defendants. The primary purpose of the MDL settlement talks was to craft a national settlement that would provide an alternative resolution mechanism for asbestos

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[3]Mr. Snyder is a partner in the San Francisco law firm Brobeck, Phleger & Harrison. Since the early 1980's, Mr. Snyder's representation has focused on asbestos litigation defense and, in particular, the defense of Fibreboard. Between 1985 and 1988, he represented the members of the Asbestos Claims Facility in northern California, and served on a number of national committees of that organization. Since 1988, he has been Fibreboard's national counsel for defense of asbestos bodily injury cases.

claims. Judge Weiner encouraged these global settlement negotiations. The talks did not produce a national settlement, but they did bear fruit. Judge Weiner's unrelenting efforts have resulted in many thousands of claims being settled against some but not all defendants, and they served as a springboard for the subsequent negotiations that eventually led to the settlement of this case. Judge Weiner's efforts also greatly aided the negotiations that resulted in a settlement between asbestos victims and defendants who had formed the Center for Claims Resolution ("CCR"), a claims handling facility created in late 1988 in the wake of the dissolution of a similar organization, the Asbestos Claims Facility. See Georgine, 157 F.R.D. at 266-67. Fibreboard had a difficult time fitting itself into the MDL-related settlement talks because it had no cash with which to make settlements.

B. Fibreboard Background

Fibreboard has employed different strategies to defend asbestos injury cases over time. Early on, like most defendants, Fibreboard relied on Manville to bear the brunt of the defense of cases. When Manville declared bankruptcy in 1982, Fibreboard had to rely totally on a then-existing interim agreement under which one of its insurance carriers, Fireman's Fund Insurance Company, provided Fibreboard with a defense of asbestos injury claims and paid indemnity as necessary.

Fibreboard joined the Asbestos Claims Facility ("ACF"), which began operations in 1985. The formation of the ACF was an effort by more than 30 companies that faced asbestos claims, and by some of their insurers, to create a mechanism to resolve asbestos-related claims through unified claims handling and joint

representation in asbestos-related personal injury litigation. The ACF was an insurance settlement. Fibreboard settled policy disputes with certain of its insurers--but not with Continental or Pacific--in order to enter the ACF. Producer members of the ACF, including Fibreboard, received a complete defense and indemnity with respect to claims for compensatory damages, even though they may have had gaps in their insurance coverage.

When Fibreboard entered the ACF, it anticipated that defense costs and indemnity levels would be kept within reasonable limits, and filings of cases in which the claimant did not appear to have any significant disease would be minimized. ACF membership overall did not achieve the results Fibreboard desired on liability and case control issues. In fact, ACF membership drew Fibreboard into types of cases and into jurisdictions where it previously had not been sued and Fibreboard became a "national" defendant sued in regions of the country and in segments of asbestos litigation in which it had not faced liability previously. The result was to double Fibreboard's exposure, even though the facts giving rise to that exposure remained unchanged.

When the ACF ceased operations in October 1988, Fibreboard no longer had any right to a defense or payment of indemnity by Fireman's Fund because the limits of that insurance coverage had been exhausted. Fibreboard had no insurance assets except for the proceeds of two settlements with the American Insurance Group of Companies ("AIG") and with Home Insurance Company, totaling approximately $100 million, and the coverage provided by policies issued by Continental and Pacific that was disputed by the Insurers in then pending

litigation. When it left the ACF, Fibreboard did not have enough cash to pay settlements of asbestos injury cases and Fibreboard's ability to mount a defense was greatly reduced because it had no insurance coverage for defense, it had insufficient funds to pay for defense, and it faced a difficult time putting together a national network of defense counsel in cooperation with other former ACF members who were at odds with one another in the wake of the difficult process of disbanding the ACF.

C. Fibreboard's Insurance Coverage Dispute

Continental issued a comprehensive general liability policy to Fibreboard commencing in May 1957, which Fibreboard terminated effective March 15, 1959. The policy had no aggregate limit, but had a $1,000,000 per occurrence limit and a $500,000 per claim limit. Pacific was alleged to have issued a similar policy to Fibreboard in May 1956.

Since 1979, Fibreboard has been engaged in litigation with Continental and Pacific as to whether Fibreboard is entitled to be defended and indemnified under those policies with respect to asbestos-related personal injury, wrongful death, and related claims. In the early 1980s, Fibreboard's action against Continental and Pacific was consolidated with other similar actions in California. Fibreboard's insurance coverage litigation, came to be captioned, In re Asbestos Insurance Coverage Cases, Judicial Council Coordination Proceeding No. 1072 (the "Coverage Case")

The Coverage Case was tried in several phases. The trial was one of the largest and most complex proceedings in the

history of American civil jurisprudence, involving numerous insureds and insurers. At stake for Fibreboard and the insurers was the question of whether Fibreboard would be determined to have no further insurance coverage under the Continental and Pacific policies or, in stark contrast, virtually unlimited coverage under those policies.

The trial court determined that any exposure to Fibreboard's asbestos products during the policy period triggered coverage; that once coverage was triggered, the insurer was liable for the full amount of the damages recovered by the claimant, subject to the per occurrence and per claim limits; and that each claim was a separate "occurrence." The court also ruled that insurers could seek equitable contribution from one another, but not from Fibreboard.

The insurers, including Continental and Pacific, appealed the trial court's decision in the Coverage Case, and the appeals were consolidated. Oral argument was conducted in several phases during the Summer of 1993, with the last phase completed on August 27. On November 15, 1993, the California Court of Appeal issued an opinion substantially affirming a number of the principal aspects of the trial court's judgment. However, the Court of Appeal simultaneously granted a joint motion of Fibreboard, Continental and Pacific to sever several insurance coverage issues unique to those parties, and to vacate submission of those issues pending further report to that court on the progress toward obtaining judicial approval of the settlement at bar. Accordingly, the disputes with respect to those severed coverage issues remain unruled upon by the California Court of Appeal, and their outcome thus remains uncertain even at the intermediate appellate level.

There are five issues currently before the California Supreme Court or the California Court of Appeal that have a significant bearing on the ultimate liability of Continental and Pacific to Fibreboard under their primary policies. These issues are commonly referred to as (i) trigger of coverage; [4] (ii) scope of coverage; (iii) number of occurrences; (iv) double anchor; and (v) lost policy. Two of these issues--trigger of coverage and scope of coverage--involve both the Continental and Pacific policies. Two issues--number of occurrences and double anchor--involve only the Continental policy. The lost policy issue involves only the Pacific policy. A loss on any one of these issues could substantially impair, if not totally eliminate, Fibreboard's ability to pay future claims. Two expert witnesses, former California Supreme Court Justice Marcus M. Kaufman and Yale University Law Professor George Priest, testified at the fairness hearing with respect to the issue of the risk--viewed both as of August 27, 1993 and today--that Fibreboard would lose the Coverage Case pending in the California appellate courts. Based on California law and the concerns and propensities of the California Supreme Court, however, it was the opinion of both Justice Kaufman and Professor Priest that as of August 27, 1993, there was a significant risk to Fibreboard that the California Supreme Court would render decisions on

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[4] The California Supreme Court recently determined that a continuous trigger applies in third-party general liability policies. The court noted the similarity of the trigger issue in the Coverage Case, but deemed it appropriate, given the unique nature of asbestos litigation, that trigger of coverage questions specifically involving asbestos claims be left for decision on an appropriate record in a case in which they are squarely presented. See Montrose Chemical Corp. of California v. Admiral Ins. Co., 10 Cal.4th 645, 676 n. 16, 42 Cal.Rptr.2d 324, 341 n. 16, 897 P.2d 1, 18 n. 16 (1995).

one or more of the coverage issues that would have the effect of either eliminating or substantially reducing further indemnity obligations by Continental and Pacific to Fibreboard for asbestos-related personal injury claims. It was also their opinion that the same risk exists today. No objector proffered any witness, testimony or evidence to contradict or impeach in any way the conclusions provided by Justice Kaufman and Professor Priest.

D. Fibreboard and the Insurers

Following the dissolution of the ACF, Fibreboard found itself with large potential asbestos liabilities, about $100 million in cash from settlements of its AIG and Home Insurance policies, and the disputed Continental and Pacific policies. Fibreboard approached the asbestos Plaintiff's bar and explained its situation. The "Structured Settlement Program" ("SSP") was the result. Under the SSP, Fibreboard agreed to settle pre-1959 claims for 40% cash, with the remainder to be paid on September 1, 1993, which deadline could be extended if the Coverage Case was not by then resolved, until September 1, 1996. Fibreboard also agreed to conserve its corporate assets, and it agreed that if it lost the Coverage Case, all of the companies assets would be turned over to the plaintiffs. The SSP was offered nationwide, and was generally accepted by plaintiffs' counsel, but higher settlement values were demanded to compensate for the risk that the deferred portion of the settlement would never be paid if Fibreboard lost the Coverage Case.

In December 1988, Fibreboard and Continental entered into what became known as the "Interim Agreement."

Continental agreed to fund the 40% cash portion of SSP settlements, which amount was to be reimbursed if Continental won the Coverage Case, Continental agreed to fund Fibreboard's defense, up to annual limits or "caps" of $25 million to $29 million per year, and Continental and Fibreboard agreed to cooperate in the management of pre-1959 claims.

The SSP did not solve Fibreboard's settlement problems. Many plaintiffs going to trial against other defendants often took Fibreboard to trial as well rather than attempt to deal with credit and set-off problems created by the SSP. As a result, Fibreboard became a defendant in a number of large consolidated trials which generated substantial defense costs for Fibreboard. Furthermore, Fibreboard's attempts to bring settlement values back to pre-ACF levels proved costly. In 1988 and 1989, Fibreboard's defense costs were almost twice the value of its negotiated settlements. In 1990, defense costs were $52 million, as compared to the $45 million nominal value in negotiated settlements. By June 1990, Fibreboard reached its annual defense cap under the Interim Agreement, and Continental therefore declined to pay Fibreboard's defense costs incurred thereafter in 1990.

In the course of negotiations to have the defense caps lifted, Fibreboard proposed in late 1990 to Continental and Pacific that the parties negotiate a complete settlement of the policies. Continental declined the proposal. Fibreboard and Pacific pursued the negotiations.

Because Fibreboard had no insurance coverage for post-1959 claims, and because all claims covered under the Pacific policy were also covered under the Continental policy,

Fibreboard entered into separate settlement negotiations with Pacific beginning in 1990 and culminating 1992. Under the resulting agreement (the "Pacific II Agreement"), Pacific would pay Fibreboard a maximum of $360 million to cover post-1959 claims, the final amount depending on the outcome of the coverage litigation and Fibreboard obtaining an order determining that Continental would have no further rights against Pacific for any asbestos-related defense or indemnity.

By 1991, Fibreboard was feeling intense pressure to initiate a new settlement program. It was facing major consolidated trials in Texas, Mississippi and Baltimore, and it had exhausted its defense monies under the Interim Agreement's defense caps. In order to shift some of the pressure to Continental, Fibreboard initiated its assignment settlement program. Under that program, Fibreboard paid no cash for pre-1959 claims, but assigned its rights to the proceeds under the Continental policy, together with any bad faith claims. Fibreboard agreed to preserve its net worth and corporate assets, and agreed that if it lost the Coverage Case, it would be responsible to pay the entire settlement amounts. Under the assignment settlement program, Fibreboard typically settled a law firm's entire inventory of cases, with a settlement average of over $11,400 per case, more than twice the $5,400 average under the 40% cash SSP.

Continental objected that the assignment settlements breached the Interim Agreement provisions calling for joint management of cases and claim-by-claim evaluation of cases, that the settlements violated policy provisions prohibiting assignment of policy rights, and that the settlement amounts were inflated, and that the pre-1959 claims were assigned a

disproportionately high share of the gross settlement amount in each office-wide settlement agreement. Fibreboard filed a number of lawsuits to test whether it's assignments were valid, and in June 1992, Fibreboard was granted summary adjudication in the Superior Court in Alameda County, California in a case known as Andrus v. Fibreboard Corp. The California Court of Appeal summarily rejected Continental's Writ of Mandate, and judgment in Andrus was entered in Fibreboard's favor in September 1992. [5] In July 1992, Continental wrote to Fibreboard and stated that it would provide a defense notwithstanding the defense caps in the interim agreement. Fibreboard determined that it would continue the assignment settlement program as long as Continental continued to reserve its coverage position.

E. Global Settlement Negotiations

In 1990, the Federal Judicial Center convened a conference of judges, academics and counsel to address the continuing issues related to asbestos litigation. In the wake of the 1990 conference, members of the asbestos bar and the judiciary took preliminary steps toward national action on the asbestos problem. A number of federal judges organized to

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[5]The decision of the Alameda County Superior Court in the Andrus case was eventually reversed on appeal. The California Court of Appeal ruled in Fibreboard Corporation v. Continental Casualty Corp., No. A059716 (Cal.Ct.App. Oct. 19, 1994), that Fibreboard did not have the right to enter into assignment settlement agreements. On January 4, 1995, the California Supreme Court denied Fibreboard's petition for review, and the decision of the Court of Appeal is now final.

explore class action treatment of the problem. In July 1990, some members of the asbestos plaintiffs' bar filed a class action in this Court pursuant to Fed.R.Civ.P. 23(b)(1)(B), Linscomb v. Pittsburgh Corning Corp., et al., Civil Action No. 1:90cv5000 (E.D.Tex.). The action was commenced on behalf of all persons (present and future) with asbestos-related personal injury claims. Many of the major asbestos defendants were sued in Linscomb, including Fibreboard. Preliminary proceedings were conducted in this Court on Linscomb in the summer of 1990. Steering committees were formed. Ronald Motley and Joseph F. Rice, of the law firm Ness, Motley, Loadholt, Richardson & Poole ("Ness Motley") were appointed to the steering committee, and Mr. Motley was designated as one of the coordinating counsel for the plaintiffs. The parties conducted settlement meetings and explored whether an overall solution to asbestos injury litigation could be found.

Fibreboard approached Mr. Motley to discuss a global settlement because Mr. Motley had been outspoken about the need for alternative approaches to asbestos litigation, and because asbestos lawyers generally advised that Ness Motley involvement would be necessary for any settlement. Mr. Motley, along with his partner at Ness Motley, Mr. Rice, agreed to consider global settlement negotiations on an assignment basis.

Fibreboard also approached Steven Kazan and Harry Wartnick in late 1990 or early 1991. Mr. Kazan and Mr. Wartnick were selected because they had the most information about Fibreboard's West Coast activity, and the plaintiffs' bar looked to them for guidance in Fibreboard litigation.

Having decided to pursue global negotiations, the Ness Motley lawyers, Mr. Kazan and Mr. Wartnick ("Plaintiffs' Counsel") [6] retained the law firm of Caplin & Drysdale, Chartered, to represent them and assist them in handling certain highly complex tax, insurance, class action and commercial litigation issues that might arise in the negotiations and that they believed might be beyond their areas of personal expertise.

Fibreboard supplied Plaintiff's Counsel with information about its past claims experiences, historical settlement averages, and financial information, on a confidential basis. Plaintiffs' Counsel also drew upon a substantial body of knowledge about Fibreboard that had been collected by them and by other plaintiffs' counsel. During the many years of asbestos-related litigation involving Fibreboard, various plaintiffs' counsel had conducted massive discovery of Fibreboard, including document discovery and depositions of Fibreboard's corporate officers and knowledgeable employees. These counsel had exhaustively examined the evidence bearing upon Fibreboard's involvement with asbestos and its knowledge of the hazards of asbestos. Plaintiffs' Counsel also retained experts to provide an estimated value for Fibreboard absent its asbestos liabilities and to project future asbestos claims against Fibreboard.

Armed with this information, Plaintiffs' Counsel set out to settle the post-1959 claims, which would be Fibreboard's

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[6] Another Ness Motley partner, Joseph B. Cox, Jr., became involved in these negotiations in May 1992. Tr. at 1074-75. From that point on, the term "Plaintiffs' Counsel" as used herein refers to Messrs. Rice, Cox, Kazan and Wartnick.

responsibility, to use as a benchmark for assignment settlement of the pre-1959 claims. In November 1991, it appeared that the parties had agreed to price terms of $278 million for post-1959 cases, and $1.86 billion for pre-1959 cases, but negotiations broke down over questions of opt-out rights and contribution and indemnity.

Continental had been kept informed of the settlement negotiations and had attempted to participate, but Plaintiffs' Counsel insisted on negotiating only with Fibreboard as long as there was a coverage dispute. In March 1992, Continental proposed a settlement of just the pre-1959 cases, but Fibreboard objected to any settlement that addressed only part of the company's asbestos litigation problem.

With global negotiations stalled, Fibreboard began negotiating with Ness Motley. An agreement was signed in December 1992, now known as the "Initial Ness Motley Agreement."

The Initial Ness Motley Agreement covered approximately 20,000 cases of Ness Motley and associated firms across the country, with provisions to add more cases. The average price per claim under the initial Ness Motley Agreement was $13,000, with post-1959 claims to be funded through the Pacific II settlement, and pre-1959 claims to be settled on an assignment basis. The Initial Ness Motley Agreement required that Fibreboard obtain either Continental's consent to the assignment or a court order approving the assignment. Thus, pursuant to the Initial Ness Motley Agreement, on January 11, 1993 Fibreboard filed suit in this Court against Continental, Fibreboard Corp. v. Continental Casualty Co., Civil Action No.

6:93cv11 (E.D.Tex.), seeking: (i) a declaration that the assignment in the Initial Ness Motley Agreement by Fibreboard to the claimants of Fibreboard's rights under the Continental insurance policy was valid; (ii) a declaration that the amounts Fibreboard assigned pursuant to the Initial Ness Motley Agreement were fair and reasonable; and (iii) a bar order cutting off Continental's equitable contribution rights as against Pacific. Such a bar order was simultaneously sought by Fibreboard against Continental in state court in Alameda County, California.

In February 1993 Continental's parent, CNA Financial Corporation, announced that Continental was ready to discuss a global settlement with Fibreboard. A status conference was held before this Court on March 10, 1993, at which representatives of Fibreboard, Continental and Ness Motley were present. The Court and the parties discussed the possible appointment of a Settlement Facilitator, and on March 23, 1993, the Court appointed Judge Patrick E. Higginbotham of the United States Court of Appeals for the Fifth Circuit to act as Settlement Facilitator in connection with the litigation pending in this Court between Fibreboard and Continental.

The parties set out the status of the matter and the parties' respective positions for Judge Higginbotham, and after hard-fought negotiations arrived at an agreement on April 9, 1993 (the "April 9 Agreement"). The April 9 Agreement provided, inter alia, that the parties would use their best efforts to achieve a global resolution of all of Fibreboard's asbestos liabilities, including the resolution of present cases and resolution of future asbestos personal injury claims. In the negotiations leading up to the April 9 Agreement, Continental

took the position that any global settlement with Fibreboard had to be structured as a non-opt-out class action. For Fibreboard, the sine qua non was that any settlement be funded within Fibreboard's available insurance resources. Pacific had not participated in the negotiations leading up to the April 9 Agreement because it considered the Pacific II Agreement to be binding. In response to the Fibreboard suit seeking approval of the Initial Ness Motley Agreement, and after having reached the April 9 Agreement, on April 13, 1993 Continental commenced a separate suit in this Court against both Fibreboard and Pacific, seeking a declaration that Continental's rights to equitable contribution against Pacific were unaffected by the Pacific II Agreement. Continental Casualty Co. v. Pacific Indemnity Co. and Fibreboard Corp., Civil Action No. 6:93cv 223 (E.D.Tex.). That suit was subsequently consolidated with Fibreboard's action relating to the Initial Ness Motley Agreement.

Negotiations continued on an on and off basis, sometimes under Judge Higginbotham's supervision and sometimes independently. On July 13, 1993, Messrs. Rice and Cox met in Dallas with Judge Higginbotham and representatives of Continental and Fibreboard. At that meeting Judge Higginbotham offered his view that a global settlement covering both present and future cases appeared too complex to negotiate. Accordingly, he suggested that any global settlement be limited to future cases, and that a settlement of the Ness Motley cases-- which could serve as the model for settling the presently pending Fibreboard cases--should precede further global negotiations.

With the continued active assistance of Judge Higginbotham, and after hard- fought, arm's-length negotiations,

on August 5, 1993, Continental, Fibreboard and representatives of Ness Motley agreed to an amended Ness Motley Agreement (the "Substitute Ness Motley Agreement") settling substantially all of Ness Motley's presently pending claims. The Substitute Ness Motley Agreement resolved approximately 45,000 presently pending asbestos-related personal injury claims against Fibreboard. The Substitute Ness Motley Agreement, by its terms, was subject to approval by the Court as fair and reasonable, and such approval was sought from this Court on August 5, 1993. On August 9, 1993, after reviewing the agreement itself and conducting a hearing in which this Court considered reports from the parties, from Professor Samuel Dash, and from Judge Higginbotham, this Court gave that approval.

After the conclusion of the SubThrstitute Ness Motley Agreement, Judge Higginbotham addressed a letter to this Court stating that "I am persuaded that given the momentum of this successful negotiation, you should consider directing counsel to proceed [to explore a settlement of future claims]," and observing that "we could have no better set of parties and counsel to attempt its passage." By statement on the record on August 9, and a formal order of August 11, 1993, this Court appointed Plaintiffs' Counsel to act as negotiatingcounsel on behalf of a class of future claimants who were exposed to Fibreboard asbestos-containing products and who may have contracted or might in the future contract an asbestos-related disease. Judge Higginbotham continued to serve as Settlement Facilitator.

Negotiations continued, and on August 22, 1993, Continental and Pacific reached an agreement, subject to

approval of their respective boards of directors, with respect to equitable contribution rights. Under that agreement, Pacific agreed to share with Continental the costs of funding a global settlement, with Continental funding 65% and Pacific funding the remaining 35%. Global settlement negotiations continued, and on August 22, 1993, Plaintiffs' Counsel rejected Continental's $1.3 billion offer to settle all future claims. On the night of August 23, 1993, Continental increased the Insurers' offer by $200 million to $1.5 billion, and indicated that it would be their final offer. The Insurers deemed that the $1.5 billion amount was an amount that would and should be acceptable to Plaintiffs' Counsel. Plaintiffs' Counsel rejected the offer and negotiations broke off.

The parties agreed to make one final attempt to settle before the submission of the Coverage Case appeal on August 27, 1993. The parties convened in Tyler, Texas on Thursday, August 26, 1993, for one final negotiating effort, with Court assistance in the discussions. After several hours of negotiations, Continental's counsel agreed to recommend to Continental an increase of $25 million and Fibreboard agreed to contribute $10 million remaining from its settlement with Home Insurance Company. The next morning, the Insurers agreed to this increase, and a global settlement amount of $1.535 billion was reached.

Despite this agreement on the price of the settlement, Plaintiffs' Counsel continued to insist throughout the day on August 27 on a number of additional non-price conditions to a deal. These included issues with respect to interest payments on the $1.525 billion contribution of the Insurers to the Settlement, timing of the payment of the Fibreboard $10 million

contribution, claims processing arrangements, the cut-off date for class membership (whether it should be the midnight preceding August 27 or the midnight yet to come), and, most significant, Plaintiffs' Counsel's insistence on a backup agreement between Fibreboard and the Insurers resolving the insurance dispute.

Throughout the negotiations that followed the meetings in Dallas the week of August 9, 1993, Plaintiffs' Counsel insisted that they would not agree to a global settlement unless Fibreboard and the Insurers would agree to a "backup" resolution of the Coverage Case that would become operative if for any reason a global settlement failed to achieve final court approval. Plaintiffs' Counsel were unwilling to permit a circumstance in which the Insurers might get a "free look" at the ultimate result in the Coverage Case while a global settlement was pending approval in the courts. The Insurers were unwilling to agree to such a condition unless such an agreement would cost them no more than a global settlement. This was resisted by Fibreboard, which contended that far more money would be required for defense costs outside the context of a global settlement to put Fibreboard in the same position it would be with a global settlement. The Insurers were nevertheless adamant that they would not agree to pay any more in the context of a backup agreement than in a global agreement, and, late in the afternoon of August 27, 1993, Fibreboard acceded to this principle as the price of permitting an agreement to be reached with respect to a global settlement. The backup settlement is what is now referred to as the "Trilateral Settlement."

Dduring the afternoon of Friday, August 27, 1993, as discussions continued, the parties were advised that the California Court of Appeal, at the oral argument on the last phase of the Coverage Case appeal, had indicated that it would rule on the appeal expeditiously. Although this acted as a further impetus for resolving remaining differences, not until five o'clock in the afternoon on August 27--after this Court advised the parties that it would soon close for business--was agreement reached in principle on the basic terms of the global settlement now before this Court (the "Global Settlement").

F. The Global Settlement Agreement

The terms of the Global Settlement agreement in principle were announced on August 27 in open court, as follows: Continental and Pacific, on behalf of Fibreboard, would pay into an escrow account their respective shares (pursuant to their sharing agreement) of the cash equivalent of $1.525 billion, plus interest commencing on August 27, 1993, such payment to be made no later than January 1, 1994. In addition, Fibreboard would make a contribution of $10 million to the settlement. These funds would be used by the Trust to resolve-- either through litigation or settlement--the asbestos-related personal injury and death claims of a non-opt-out class of persons who have neither filed nor settled such claims before August 27, 1993. The unsettled present cases against Fibreboard would also be identified, and an additional amount--not as of then determined--would be budgeted to resolve them. It was anticipated that to the extent the unsettled present cases could be resolved for less than the budgeted amount, 80% of the difference would be transferred to the Trust.

In addition, Fibreboard would assign to the Trust any and all claims for contribution and indemnity it might have against other joint tortfeasors arising out of certain asbestos-related personal injury claims. Fibreboard would also be responsible for the intake administration of claims for five years, and would be required to provide the Trust with all information-- including information that would otherwise be protected by privilege or trade secret confidentiality--as is reasonably necessary for the Trust to evaluate, defend and resolve the claims against it. The Insurers would be responsible for the costs associated with obtaining court approval of the Global Settlement, as well as any fees of Plaintiffs' Counsel that might be awarded by this Court up to a maximum of 3% of the settlement amount, which fees would not be paid out of the Trust's funds.

As announced in this Court on August 27, 1993, in return for the monies to be paid under the Global Settlement, Fibreboard and the Insurers would receive "total peace" with respect to any and all claims, direct or indirect, involving the asbestos-related personal injury and death claims of the class members. The Global Settlement would also include the complete resolution of the insurance coverage dispute between Fibreboard and the Insurers. A prerequisite to presentation of the Global Settlement for court approval was the conclusion of a separate backup agreement between Fibreboard and the Insurers settling the insurance coverage litigation, and providing funds to Fibreboard to be used for the satisfaction of claims against Fibreboard in the event that the Global Settlement were not approved.

G. The Trilateral Settlement Agreement

On August 30, 1993, Fibreboard and representatives of the Insurers gathered in New York to work out the specific terms of the Trilateral Settlement, which was Plaintiffs' Counsel's precondition for negotiating the details of documenting the Global Settlement. Hard-fought and contentious negotiations finally yielded an agreement whereby the Insurers would pay a total of $2 billion as a complete resolution of all liabilities under the policies: in effect, a complete policy buyout.

The terms of the Trilateral Settlement, and of a series of provisions amending the April 9 Agreement, were described to this Court on September 9. Plaintiffs' Counsel then filed the complaint in this action later that day. Papers seeking provisional certification of the plaintiff class in this action (the Global Health Claimant Class) and a temporary restraining order against the filing of additional claims against Fibreboard or the Insurers were also filed. This Court thereafter granted the motions for provisional class certification and for a temporary restraining order.

Fibreboard and the Insurers thereafter turned to formally documenting the Trilateral Settlement. Lengthy, hard-fought, arm's-length negotiations toward that end finally resulted in the signing of the Settlement Agreement (the "Trilateral Settlement Agreement") on October 12, 1993. Following the signing of the Trilateral Settlement Agreement, Plaintiffs' Counsel and representatives of Fibreboard and the Insurers turned to the negotiation and drafting of a written agreement reflecting the Global Settlement. Although the terms of the global agreement

in principle had been put on the record on August 27, 1993, numerous detailed provisions that are contained in the fully documented agreement remained to be and were negotiated over a two-month period commencing in mid-October 1993. In addition, the "Third-Party Claimant Class Settlement" was negotiated during this time period. The formal documentation of the Global Settlement (the "Global Settlement Agreement"), as well as the Third-Party Claimant Class Settlement (entitled "Defendant Class Settlement Agreement" and now referred to as the "Third-Party Claimant Class Settlement Agreement"), were finalized, including the signatures of all the parties thereto, on December 23, 1993.

KEY SETTLEMENT TERMS

There are four settlement agreements before the Court for approval: the Global Settlement, the Global Third-Party Claimant Class Settlement, the Trilateral Settlement, and the Longshore Settlement. The Global Settlement is intended to settle all future asbestos-related personal injury claims against Fibreboard and its Insurers. In order to accomplish one of the primary goals of the Global Settlement--to get Fibreboard and the insurers out of the asbestos litigation business--some mechanism had to be developed for dealing with contribution and indemnity claims arising out of Global Health Claimant Class member claims against other asbestos defendants. The Global Third-Party Claimant Class Settlement addresses these issues. The Trilateral Settlement, which was negotiated as a back-up to the Global Settlement, is essentially a buy-out of the Continental and Pacific policies, which would provide Fibreboard with a $2 billion fund to settle or defend present and future asbestos claims against it. The Longshore Settlement was

negotiated to foreclose the possibility that the Global Settlement might adversely affect the rights of Global Health Claimant Class members who are covered by the Longshore and Harbor Workers' Compensation Act (LHWCA) 33 U.S.C. s 901, et seq.

A. The Global Settlement

The Global Settlement settles all claims for asbestos-related personal injury or death against Fibreboard, Continental and Pacific by all members of the Global Health Claimant Class, and provides a structure for the handling of the proceeds of the $1.525 billion Coverage Case settlement and the additional $10 million to be contributed by Fibreboard. In addition, the Global Settlement Agreement discharges the Insurers from any obligations in connection with the insurance policies, whether with respect to asbestos-related personal injury and death claims or not, except for obligations specifically assumed or preserved in the various agreements between them.

The purposes of the Global Settlement Agreement are: (i) to resolve finally all asbestos-related personal injury claims of the Global Health Claimant Class against Fibreboard and the Insurers, and to direct such claims to the Trust; (ii) to provide for a simple, efficient process by which persons who were injured through exposure to Fibreboard asbestos could quickly obtain a fair settlement or resolution of their claims while safeguarding the claimants' rights to proceed against the Trust in the tort system; (iii) to enhance the likelihood that assets would remain available to injured class members whose claims develop far in the future by limiting how much of the Trust's assets can be paid in any given year; (iv) to prioritize payments so that in the event of any shortfall the sickest claimants are paid

first; and (v) to protect the Trust's assets from unduly risky investments.

Under the Global Settlement, Fibreboard, Continental and Pacific receive full releases from the members of the Global Health Claimant Class with respect to any asbestos- related personal injury or death claim, and all such claims will be directed to a Trust for processing and payment pursuant to the procedures set forth in the Trust Distribution Process ("TDP"). In order to receive compensation, claimants must first seek to settle with the Trust. If a settlement cannot be reached, the next step is mediation and then arbitration. If an acceptable resolution still cannot be reached, the claimant may then try the claim in the tort system, subject to the overall limit of $500,000 per claim. [7] Claims that are resolved against the Trust before resort to the tort system will be paid over three years; claimants who exercise their right to exit to the tort system after exhausting the specified claims processing procedures will be paid over as few as five years or as many as ten. The TDP contains certain spendthrift provisions that limit the proportion of the Trust's assets that can be paid out in any given year to ensure that funds will be available to claimants who assert claims against the Trust years into the future. If funds prove insufficient in any given year to pay all claimants, claimants suffering from more serious diseases are generally paid before those with less severe injuries, and within categories of injuries those claimants waiting the longest are paid first.

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[7]Punitive damages and prejudgment interest are not available to any claimant against the Trust.

B. The Third-Party Claimant Class Settlement

The terms of the Global Settlement Agreement are intended to provide the Insurers and Fibreboard with total protection with respect to claims arising from Global Health Claimant Class Member Claims, i.e., Global Third- Party Claims. Thus, the Global Settlement Agreement provides that it cannot be finally approved until the discharge of and injunction against Global Third- Party Claims are obtained.[8]

To this end, a settlement with respect to the claims of members of the Global Third-Party Claimant Class has been agreed upon by Owens-Illinois, as representative of the Global

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[8]The Global Settlement Agreement contains provisions that deal with the possibility of the Court being unable to issue an order barring all such Global Third-Party Claims against Fibreboard, Continental and Pacific, including an agreement by members of the Global Health Claimant Class to reduce, under certain circumstances, any judgments they obtain against Global Third-Party Claimant Class members in such amounts (up to but not in excess of the amount of the judgment against any such Global Third-Party Claimant Class member) as may be necessary to permit the Court to issue orders providing for the discharge of and injunctions against such Global Third-Party Claims as is required for the entry of Global Approval Judgment. In response to objections from two potential Global Third-Party Claimant Class Members, the Commonwealth of Pennsylvania and the State of Rhode Island, the Settling Parties agreed that the fifty states of the United States (and their governmental units and divisions entitled to immunity under the Eleventh Amendment), and governments of foreign nations (and units and divisions thereof) entitled to sovereign immunity are not subject to the Court's jurisdiction. The Global Settlement Agreement was therefore amended to provide that Global Health Claimant Class members will reduce judgments in their favor against such entities in such amounts as may be necessary to extinguish any such Global Third-Party Claims under applicable law.

Third-Party Claimant Class, the Global Health Claimant Class representatives, Fibreboard and the Insurers. This settlement is embodied in the Third-Party Claimant Class Settlement Agreement. The Third- Party Claimant Class Settlement Agreement represents a resolution of all Global Third-Party Claims that could be asserted against Fibreboard, Continental or Pacific.

The Third-Party Claimant Class Settlement Agreement contains three principal provisions: (i) that the Global Third-Party Claimant Class will release Fibreboard and the Insurers as to any and all Global Third-Party Claims and agree that Global Approval Judgment shall bar and enjoin permanently Global Third-Party Claimant Class members from prosecuting any Global Third-Party Claims against Fibreboard or the Insurers; (ii) that Fibreboard and the Insurers will release the Third-Party Claimant Class as to any and all contribution or indemnification claims; and (iii) that members of the Third-Party Claimant Class will have the rights set forth in Section H of the TDP. Section H, in turn, affords different rights in three different scenarios that can arise. First, where a personal injury claimant liquidates his or her claim against the Trust before obtaining a judgment against a Global Third-Party Claimant Class member, the class member receives a reduction of any judgment subsequently entered against it to reflect the personal injury claimant's recovery from the Trust, in whatever amount is dictated by the set-off, contribution, indemnity or similar principles of the applicable state law. Second, where a personal injury claimant exhausts the Trust process and litigates against the Trust in the tort system, and also files suit against a Global Third-Party Claimant Class member, the class member likewise receives a judgment

reduction, in whatever amount is dictated by the applicable state law, for any joint-and-several portion of any judgment against it reflecting Fibreboard's liability share. Third, where a personal injury claimant obtains a judgment against a Global Third-Party Claimant Class member prior to liquidating his or her claim against the Trust, and the Global Third-Party Claimant Class member pays the joint-and-several portion (if any) of that judgment, it succeeds to whatever rights the personal injury claimant would have had against the Trust. [9]

The salient feature of the Third-Party Claimant Class Settlement is thus that it preserves all rights the Global Third-Party Claimant Class member would possess as against the Trust under applicable law in those cases where a personal injury claimant recovers from the Trust first; and it affords the Global Third-Party Claimant Class member all of the personal injury claimant's rights against the Trust (with the minor exception of the right to exit to the tort system) in those cases where such a claimant recovers from the class member first. For this reason, the Third-Party Claimant Class Settlement affects Global Third-Party Claimant Class members principally in that their contribution and indemnification claims will be addressed through set-offs and subrogation rights stemming from

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[9]There is one exception: if the class member were not satisfied with the Trust's offer, it--unlike a personal injury claimant against the Trust--would not be permitted to exit to the tort system; the matter would instead be resolved through binding arbitration.

settlements and proceedings involving the Trust, rather than Fibreboard or the Insurers.

The Third-Party Claimant Class Settlement provides a substantial benefit to Global Third-Party Claimant Class members. By facilitating the Global Settlement, the Third-Party Claimant Class Settlement creates a trust with over $1.5 billion available to pay claims and, in accordance with applicable law, to offset obligations of members of the Global Third-Party Claimant Class. Very few objections to the Third-Party Claimant Class Settlement have been asserted.

In addition, the Third-Party Claimant Class Settlement provides a reasonable, reliable, fair and predictable mechanism to handle third-party claims. Because the Third-Party Claimant Class Settlement avoids intensive litigation of the sort that occurred in the Manville proceedings, the complexities of attempting to create a new rule in the tort system, and the uncertainties of leaving third-party issues to further litigation, this Court finds that the Third-Party Claimant Class Settlement is better than any alternative.

The Third-Party Claimant Class Settlement Agreement was the product of negotiations among Plaintiffs' Counsel, Fibreboard and representatives of the major asbestos manufacturers. These negotiations were sophisticated, arm's-length and non-collusive. Indeed, these negotiations resolved an issue that has been the subject of contentious disputes in other asbestos-related settlement proceedings, such as Georgine and Manville.

The overwhelming credible testimony demonstrates that the Third-Party Claimant Class Settlement Agreement is fair, reasonable and adequate, and that its benefits far outweigh the incidental restrictions it places on members of the Global Third-Party Claimant class.

C. The Trilateral Settlement

The Trilateral Settlement Agreement, settles the insurance coverage disputes between Fibreboard and the Insurers whether or not the Global Settlement is approved or successfully withstands subsequent attack. The Trilateral Settlement Agreement provides that, upon specified court determinations, Continental and Pacific shall be discharged from any further obligations or liabilities to Fibreboard or to any other person or entity under or in connection with the insurance policies issued to Fibreboard whether asbestos-related or not (except for obligations that an Insurer has specifically assumed or preserved under the Trilateral Settlement Agreement, the April 9 Agreement, the Global Settlement Agreement or the Supplemental Agreement). The Trilateral Settlement Agreement does not, however, preclude the assertion of any such claims against Fibreboard. In addition, the Trilateral Settlement Agreement provides for Fibreboard to indemnify Continental and Pacific against certain further asbestos-related personal injury claims whether or not the Global Settlement is approved or successfully withstands collateral attack.

If the Global Settlement is not approved but the Trilateral Settlement is approved, the $1.525 billion plus interest from the Insurers, plus an additional $475 million, less certain deductions, will be made available to Fibreboard, either directly

or through a trust, to enable Fibreboard to pay defense costs and claims with respect to asbestos-related personal injuries-- not only claims not filed or settled prior to August 27, 1993, but also asbestos-related personal injury claims against Fibreboard that were unsettled as of August 23, 1993. Fibreboard may also use up to $65 million from these funds for costs associated with asbestos-related property damage claims and non-asbestos claims.

The Trilateral Settlement was the result of hard fought, arm's-length negotiations between Fibreboard and Continental. The negotiations leading to the Trilateral Settlement were intense and contentious, and there is a complete absence of evidence of collusion in connection therewith. The Court is satisfied that the Trilateral Settlement is fair and reasonable.

D. The Longshore Settlement

On December 5, 1994, the Global Health Claimant Class representatives, on behalf of themselves and the Global Health Claimant Class, Bethlehem Steel Corporation, on behalf of itself and a class of employers and insurance carriers (the Longshore Defendant Class), and the Director, Office of Workers' Compensation Programs, United States Department of Labor (the "Director"), entered into a settlement with respect to certain rights and obligations that members of the Global Health Claimant Class and members of the Longshore Defendant Class might have under the Longshore and Harbor Workers Compensation Act ("LHWCA"), 33 U.S.C. ss 901, et seq., and related statutes.

LHWCA provides that if a person entitled to compensation under LHWCA settles a claim against a third-party for which he or she would be entitled to receive Longshore benefits for less than the LHWCA compensation, the employer is liable for compensation only if the person entitled to benefits first obtained approval of the settlement from the employer and the employer's insurance carrier. 33 U.S.C. s 933(g)(1). If the person entitled to compensation obtains a judgment or settles a claim for more than the LHWCA compensation, the person entitled to benefits is required to notify the Longshore Employer of the judgment or settlement. 33 U.S.C. s 933(g)(2). Failure to comply with s 933(g)(2)'s notice requirements terminates the employer's obligation to pay Longshore benefits.

Plaintiffs' Counsel, the Secretary of Labor, and certain intervenors with potential LHWCA claims were concerned that Longshore employers might assert that the Global Settlement and related judgment constitute either a settlement under s 933(g)(1) or (g)(2) or a judgment under s 933(g)(2) for which the applicable notice or pre-approval requirements had not been satisfied.

Bethlehem agreed to serve as a representative of a class of Longshore employers. Bethlehem consulted with other Longshore employers during the course of negotiations, and eventually a settlement was reached between Bethlehem and the settling parties in which it was agreed that the final approval of the Global Settlement would not constitute a "settlement" under 33 U.S.C. s 933(g) which would operate to create a forfeiture of LHWCA compensation rights by Global Health Claimant Class members against the Longshore Defendant Class and that

Longshore Defendant Class members would have the right (i) to obtain liens or credits; (ii) to receive notice and an opportunity to approve settlements; and (iii) to be informed of judgments and arbitration awards when Global Health Claimant Class members pursue claims against the Trust.

On February 2, 1995, the Court conducted a hearing on the fairness of the Longshore Settlement. No Longshore Defendant Class member or Global Health Claimant Class member appeared at the hearing to voice objections to the settlement, and no Longshore Defendant Class member filed written objections to the settlement. The Longshore Settlement clears a potential obstacle to final approval to the Global Settlement, which in turn potentially reduces the net obligations of members of the Longshore Defendant Class to members of the Global Health Claimant Class. The Court finds the Longshore Settlement to be fair and reasonable.

JURISDICTION

This Court has subject matter jurisdiction over these proceedings pursuant to 28 U.S.C. s 1332. Diversity of citizenship is present and is uncontested, but the Ortiz Intervenors contend that s 1332's amount-in-controversy requirement is not satisfied.

For diversity jurisdiction to exist, the amount-in-controversy requirement-- allegations of damage in excess of $50,000--must be satisfied. 28 U.S.C. s 1332(a).

In determining the amount in controversy, "the sum claimed by the plaintiff controls ... [unless it] appear[s] to a legal

certainty that the claim is really for less than the jurisdictional amount." St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89, 58 S.Ct. 586, 590, 82 L.Ed. 845 (1938). Although the plaintiffs bear the burden of proving the requisite amount in controversy, the burden is not a heavy one, and the plaintiff need demonstrate only that it is not impossible that he or she will recover more than $50,000. See Seafoam, Inc. v. Barrier Systems, Inc., 830 F.2d 62, 66 (5th Cir.1987). In determining the amount in controversy, claims for punitive damages must be included in the computation. See Bell v. Preferred Life Assurance Soc., 320 U.S. 238, 240, 64 S.Ct. 5, 6, 88 L.Ed. 15 (1943).

The amount-in-controversy requirement is satisfied because each Class member could lawfully allege damages in excess of $50,000. The amount-in-controversy requirement may be satisfied in mass-tort class actions, including class actions consisting partly or entirely of people who had not, at the time of filing, manifested any symptoms, illness or injury. See, e.g., In re Joint E. & S. Dist. Asbestos Litigation ("Manville"), 982 F.2d 721, 734 (asbestos: amount-in-controversy requirement satisfied although some members were "exposure only"); Carlough v. Amchem Prods. Inc., 834 F.Supp. 1437, 1456-62 (E.D.Pa.1993) (asbestos: same); In re A.H. Robins Co., 880 F.2d 709, 725 (4th Cir.) (Dalkon Shield: "indisputable that it cannot be said to a 'legal certainty' that the jurisdictional amount herein was not satisfied" where the class included women who had used the shield but who had not yet manifested an injury), cert. denied, 493 U.S. 959, 110 S.Ct. 377, 107 L.Ed.2d 362 (1989); In re "Agent Orange" Product Liability Litigation, 996 F.2d 1425, 1434 (2d Cir.1993) (Agent Orange), cert. denied, --- U.S. ----, 114 S.Ct.

1125, 127 L.Ed.2d 434 (1994). Those members of the Global Health Claimant Class who have been exposed to asbestos, but who have not yet developed recognizable disease or injury, seek, inter alia, damages to compensate for fear of cancer and for enhanced risk of developing cancer, damages tied to the need to undergo medical monitoring to detect the early development of asbestos-related disease, and punitive damages. Each Global Health Claimant Class member, including each so-called "exposure-only" claimant, has a good faith basis for arguing for application of authorities permitting recovery for fear of cancer, risk of cancer and medical monitoring. See, e.g., Potter v. Firestone Tire and Rubber Co., 6 Cal.4th 965, 25 Cal.Rptr.2d 550, 570-71, 863 P.2d 795, 816 (1993); Miranda v. Shell Oil Co., 17 Cal.App.4th 1651, 26 Cal.Rptr.2d 655 (1993); Barras v. Monsanto Co., 831 S.W.2d 859 (Tex.App.--Houston [14 Dist.] 1992, writ denied). Fibreboard's headquarters are located in California, a state that recognizes claims for medical monitoring and fear of cancer. Accordingly, such claims could be asserted against Fibreboard by all members of the Global Health Claimant Class.

Furthermore even if some class members could not allege damages in excess of $50,000, the Court would still have jurisdiction because all the Class representatives could lawfully allege damages in excess of $50,000. In a class action, so long as the class representatives meet the amount-in- controversy requirement, all other class members fall within this Court's supplemental jurisdiction, regardless of the value of their claims. Moores Federal Practice, P 0.97, at 928 (2d ed. 1994); 2 Herbert B. Newberg & Alba Conte, Newberg on Class Actions, s 6.11, at 6-48 (3d ed. 1992).

CLASS ACTION PREREQUISITES

A. Rule 23(a) Prerequisites

Rule 23(a) lists four prerequisites to a class action: (1) the class is so numerous that joinder of all members is impractical, (2) there are questions of law and fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. A class may be certified if all four prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure are met and one or more of the provisions of Rule 23(b) is satisfied. "The district court has wide discretion in deciding whether or not to certify a proposed class." Jenkins v. Raymark Industries, Inc., 782 F.2d 468, 471-72 (5th Cir.1986).

Rule 23 requirements apply to all federal class actions; however, a number of courts have held that they are often more readily satisfied in the settlement context because the issues for resolution by the Court are more limited than in the litigation context. See In re A.H. Robins Co., 85 B.R. 373, 378 (E.D.Va.1988), aff'd, 880 F.2d 709 (4th Cir.1989); Officers for Justice v. Civil Service Comm'n of City and County of San Francisco, 688 F.2d 615, 633 (9th Cir.1982), cert. denied, 459 U.S. 1217, 103 S.Ct. 1219, 75 L.Ed.2d 456 (1983); In re Dennis Greenman Securities Litigation, 829 F.2d 1539, 1543 (11th Cir.1987); Bowling v. Pfizer, Inc., 143 F.R.D. 141, 158 (S.D.Ohio 1992), appeal dismissed without op., 995 F.2d 1066 (6th Cir.1993); see also 2 Newberg on Class Actions s 11.28 (3rd ed. 1992). Courts have approved settlements and finally certified settlement classes while at the same time holding that

class certification for litigation purposes might be improper. See, e.g., Officers for Justice, 688 F.2d at 633; In re Anthracite Coal Antitrust Litigation, 79 F.R.D. 707, 713-14 (M.D.Pa.1978) (court approved class settlement while noting that certification for litigation purposes would be doubtful), aff'd in part without op. and vacated in part without op. sub nom. Colonial Fuel Co. v. Blue Coal Corp., 612 F.2d 571 (3d Cir.1979) (table); Wilkes-Barre Steam Heat Co. v. Blue Coal Corp., 612 F.2d 576 (3d Cir.1979) (table). Other Courts have held that Rule 23 prerequisites may not be relaxed merely because a settlement class is involved rather than a litigation class. See In re General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768, 799 (3rd Cir.1995). This Court approaches the Rule 23(a) prerequisites under the assumption that Rule 23(a)'s requirements are no different in the settlement context than in the litigation context.

Rule 23(a) provides that a class action may be brought if: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

1. Numerosity

The numerosity requirement of Rule 23(a) is obviously satisfied. With Class membership numbering in the hundreds of thousands, joinder of the Class members' claims would plainly be impracticable. See Boykin v. Georgia- Pacific Corp., 706 F.2d 1384, 1386 (5th Cir.1983), cert. denied, 465 U.S. 1006,

104 S.Ct. 999, 79 L.Ed.2d 231 (1984) (317-member class met numerosity requirement).

2. Commonality

Rule 23(a) requires that there be at least one legal or factual issue common to all class members. See 3B J. Moore and J. Kennedy, Moore's Federal Practice P 23.06-1, at 23-159-23-160 (2d ed. 1993); Jenkins, 782 F.2d at 472 ("The threshold of 'commonality' is not high," as "the rule requires only that resolution of the common questions affect all or a substantial number of the class members"); Walker v. Jim Dandy Co., 638 F.2d 1330, 1336 (5th Cir.1981). That requirement has been met. All Class members here have an overriding common interest in eliminating the risk posed by the coverage litigation and creating a substantial fund of insurance proceeds to provide compensation for Class members. Consequently, many major issues presented by the Class are common to all of its members, including whether claimants against Fibreboard have a right to substantial insurance proceeds notwithstanding the existence of a coverage dispute; and whether some curtailment of the Class's rights in the tort system is appropriate in order to enable a resolution of the coverage dispute that equitably distributes the insurance proceeds. See Georgine, 157 F.R.D. at 316; 2 Newberg on Class Actions s 11.28, at 11- 58-11-60. See also Jenkins, 782 F.2d at 473 (affirming class certification of limited issues including liability but not damage and causation).

3. Typicality

"The 'typicality' requirement focuses ... on the similarity of the legal and remedial theories behind [the named and unnamed plaintiffs'] claims." Jenkins, 782 F.2d at 472. Consequently, in the settlement context, it "requires proof that the interests of the class representatives and the class are commonly held for purposes of receiving similar or overlapping benefits from a settlement." 2 Newberg on Class Actions s 11.28, at 11-58. The requirement may be met even though "[t]he degree of harm may differ between the representatives and members of the class according to the degree of exposure (if any), the effects of the asbestos disease process, and the nature of the disease contracted by the individual." Jenkins v. Raymark Indus., Inc., 109 F.R.D. 269, 272 (E.D.Tex.1985), aff'd, 782 F.2d 468 (5th Cir.1986); see also In re General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768, 817 (3rd Cir.1995) (noting that individual issues of causation, reliance, and damages do not ordinarily preclude class action treatment of mass torts); Ladd v. Dairyland County Mut. Ins. Co., 96 F.R.D. 335, 337 (N.D.Tex.1982). The legal and remedial theories of the representative plaintiffs are typical of the Class. All Class members' claims arise from exposure to asbestos for which Fibreboard may bear legal liability, and all Class members share the following common interests: (i) avoiding the potentially disastrous results of a loss by Fibreboard in the Coverage Case appeal; (ii) maximizing the total settlement contribution from Fibreboard and the Insurers; (iii) streamlining the procedures for the filing, processing and resolution of claims, and thereby reducing transaction costs and delays in compensation; (iv) minimizing the percentage of their compensation diverted from

them to pay attorneys' fees; and (v) adopting procedures that provide for payments to claimants in an equitable manner.

4. Adequacy of Representation

The adequacy requirement contains two elements: "The first concerns the qualifications of counsel, and the second concerns the relationship between the interests of the class representatives and the interests of the other class members." Jenkins, 109 F.R.D. at 273.

a. Class Counsel

Class Counsel are highly competent, skilled and experienced members of the plaintiffs' asbestos bar, were well qualified to serve as Class Counsel in this case, and the Court is satisfied that Class Counsel adequately represented the class.

The Ortiz Intervenors contend that Class Counsel's representation was inadequate due to a conflict created by their representation of present claimants at the same time they were negotiating on behalf of the Class. The Court is satisfied that any potential conflicts that could theoretically have arisen between Class Counsel's present claimants and the Class never materialized. Indeed, given the short window of opportunity to negotiate a global settlement created by the Coverage Case appeal, the Court finds it unlikely that counsel less intimately involved with Fibreboard's overall asbestos problem could have reached nearly so favorable a settlement for the Class.

The Ortiz Intervenors also contend that the negotiation of an attorneys' fee agreement more or less at the same time as

the negotiation of the Global Settlement taints Class Counsel's representation of the Class.

When fee and settlement negotiations occur simultaneously, there is a danger of collusion between class counsel and the defendant. In re General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F.3d at 803. In the instant case, however, there is considerably less to the agreement than meets the eye. As a part of the Global Settlement Agreement, the Insurers agreed to fund an attorneys' fee award in addition to the settlement fund in an amount set by the Court up to 3% of the total settlement. Continental was willing to bear the costs of administering the settlement, but it was not willing to fund attorneys fees up to the 25% sometimes awarded class counsel in securities fraud class actions. Class Counsel understood, and Judge Higginbotham made clear to them during the negotiations, that they could not expect that any particular fee would be awarded. There is nothing about the fee agreement that would lead the Court to believe that Class Counsel's representation of the Class was in any way compromised.

b. Class Representatives

The Class representatives have also adequately represented the Class. Class representatives satisfy the adequacy requirement unless they have "an insufficient stake in the outcome or interests antagonistic to the unnamed members." Jenkins, 782 F.2d at 472; see also Georgine, 157 F.R.D. at 317 ("The key question is whether their interests are antagonistic.") (quoting Steiner v. Equimark Corp., 96 F.R.D. 603, 610 (W.D.Pa.1983)) (emphasis in original). And "so long as all class

members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not antagonistic for representation purposes." In re Corrugated Container Antitrust Litigation, 643 F.2d 195, 208 (5th Cir.1981).

The Class representatives have a sufficient stake in the outcome, and the interests of the Class representatives and the members of the Class are not antagonistic. The Class representatives span the range of the various medical categories under the Trust Distribution Process and include both already-impaired and not-yet-impaired claimants. The Class representatives and the members of the Class--all of whom are equally at risk in the coverage litigation--are united in seeking the maximum possible recovery for their asbestos-related claims. See Jenkins, 109 F.R.D. at 274.

The Class representatives played a sufficient role in the action, notwithstanding that they were named after the agreement in principle was reached and that they relied on Class Counsel in the subsequent settlement negotiations. "It is not a requirement that representative plaintiffs have specific knowledge of the claims and issues in the action, or that they play a personal role in the direction and management of the action." Georgine, 157 F.R.D. at 317. See Longden v. Sunderman, 123 F.R.D. 547, 558 (N.D.Tex.1988) (the law well recognizes that, in "complex" matters, "it is unreasonable to expect the class representatives to possess detailed, personal knowledge"); Gibb v. Delta Drilling Co., 104 F.R.D. 59, 77 (N.D.Tex.1984). "[T]he primary criterion for determining whether the class representative has adequately represented his class ... is whether the representative, through qualified counsel,

vigorously and tenaciously protected the interests of the class." Gonzales v. Cassidy, 474 F.2d 67, 75 (5th Cir.1973) (emphasis added); accord Longden v. Sunderman, 123 F.R.D. at 559; Durrett v. John Deere Co., 150 F.R.D. 555, 558 (N.D.Tex.1993).

B. Rule 23(b)(1)(B)

Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure provides that a class action may be maintained if the prerequisites of subdivision (a) of Rule 23 are satisfied, and in addition "the prosecution of separate actions by or against individual members of the class would create a risk of ... adjudication with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests."

Rule 23 is to be interpreted according to its "plain meaning." See, e.g., Pavelic & LeFlore v. Marvel Entertainment Group, Div. of Cadence Indus. Corp., 493 U.S. 120, 123, 110 S.Ct. 456, 458, 107 L.Ed.2d 438 (1989). As used in the Rule, the requisite "risk" of impairment need not be a certainty or even a better-than 50% likelihood. Instead, the term "risk" refers only to a "substantial probability," which has been described as--"more than a mere possibility" but "less than a preponderance." In re Joint Eastern and Southern Dist. Asbestos Litigation ("Manville "), 129 B.R. 710, 765, vacated on other grounds, 982 F.2d 721 (2d Cir.1992), modified, 993 F.2d 7 (2d Cir.1993); accord In re Granada Partnership Sec. Litigations, 803 F.Supp. 1236, 1244 (S.D.Tex.1992); In re

Joint Eastern and Southern Dist. Asbestos Litigation ("Eagle-Picher "), 134 F.R.D. 32, 35 (E. & S.D.N.Y.1990); In re First Commodity Corp. Customer Accounts Litigation, 119 F.R.D. 301, 312 (D.Mass.1987); Jenkins, 109 F.R.D. at 276-77; In re Jackson Lockdown/MCO Cases, 107 F.R.D. 703, 713 (E.D.Mich.1985); In re "Agent Orange" Product Liability Litigation, 100 F.R.D. 718, 726 (E.D.N.Y.1983), aff'd, 818 F.2d 145 (2d Cir.1987), cert. denied, 484 U.S. 1004, 108 S.Ct. 695, 98 L.Ed.2d 647 (1988).

No one disputes that there was a significant risk--more than a mere possibility--that Fibreboard would lose on one or more issues in the Coverage Case, or that Fibreboard might lose its insurance coverage as a result of its assignment settlement program. The Court heard expert testimony regarding the risks, and the risk inherent in Fibreboard's insurance dispute is further reflected in the fact that Fibreboard's settlement average under its no-cash assignment settlement program was more than twice its the settlement average under the 40% cash SSP. The risk that available funds could be inadequate to pay all claims constitutes a risk of substantial impairment under Rule 23(b)(1)(B).

The need to protect Class members' "common interests" in the insurance proceeds subject to the coverage dispute demands a unitary resolution permitting equitable distribution. Numerous courts applying Rule 23(b)(1)(B) have certified classes under the Rule where allowing separate actions would have created a risk that early individual adjudications would have exhausted all available assets. See, e.g., Manville, 982 F.2d at 738-39; In re Drexel Burnham Lambert Group, 960 F.2d 285, 292 (2d Cir.1992), cert. dismissed, --- U.S. ----, 113

S.Ct. 1070, 122 L.Ed.2d 497 (1993); In re Silicone Gel Breast Implant Products Liability Litigation (MDL 926), CV 93-P-11433-S (N.D.Ala., June 1, 1993); In re Granada, 803 F.Supp. at 1244; Eagle-Picher, 134 F.R.D. at 35; County of Suffolk v. Long Island Lighting Co., 710 F.Supp. 1407, 1418 (E.D.N.Y.1989), aff'd, 907 F.2d 1295 (2d Cir.1990); Bush v. Rewald, [1986-87 Transfer Binder] Fed.Sec.L.Rep. (CCH) P 92,999, 1986 WL 15338 (D.Haw., Sept. 4, 1986); In re Jackson Lockdown/MCO Cases, 107 F.R.D. 703, 712-13 (E.D.Mich.1985); Coburn v. 4-R Corp., 77 F.R.D. 43, 45-46 (E.D.Ky.1977). See also Jenkins v. Raymark Indus., Inc., 109 F.R.D. 269, 276 (E.D.Tex.1985), aff'd, 782 F.2d 468 (5th Cir.1986) ((b)(1)(B) certification is appropriate where "the brink of insolvency will be reached during the litigation").

The Global Settlement resolves both the insurance coverage dispute between Fibreboard and the insurers, and the claims of all class members against Fibreboard and the insurers. The Global Settlement involves a uniquely situated defendant in a mass tort that has created unparalleled problems for the courts and the litigants. The Global Settlement resulted from a unique set of circumstances not likely to be repeated. Resolution of the insurance dispute required a unitary settlement in a proceeding in which all claims were compromised. On these facts, allowance of individual adjudications by class members would have destroyed the opportunity to compromise the insurance coverage dispute by creating the settlement fund, and would have exposed the class members to the very risks that the settlement addresses--a situation that falls squarely under Rule 23(b)(1)(B). See In re Jackson Lockdown, 107 F.R.D. at 708, 712; In re A.H. Robins, 85 B.R. at 380.

Whether mandatory class certification is appropriate in the typical case where a class action is settled with a defendant's own funds, or with insurance funds that are not the subject of genuine and vigorous dispute is not a question this Court need answer here. In such a case, if the settlement failed because separate actions were permitted, the defendant would retain the settlement funds (or the insurance coverage), and there might not be the "impair[ment]," to class members' "ability to protect their interests" required for mandatory class certification by Rule 23(b)(1)(B), so long as the defendant has adequate funds to pay all class members' claims. The destruction of the settlement fund here, however, constitutes a "risk" within the meaning of Rule 23(b)(1)(B) because the source of that fund (and any meaningful recovery for the Class) is a non-defendant whose obligations are seriously in doubt and may well disappear entirely if the settlement were to fall through--with the result that Class members could not then secure their due through litigation.

The Ortiz Intervenors and the Flanagan Intervenors object that this class action cannot be maintained under Rule 23(b)(1)(B), alleging that there is no genuine "limited fund" because Fibreboard is allowed to retain most of its non-insurance assets under the settlement. The objection is misplaced for two reasons. First, although the limited fund situation is commonly associated with Rule 23(b)(1)(B), the Rule itself does not require a limited fund. Second, even under a limited fund analysis, and there is a limited fund in this case, see Conclusions of Law PP 37-39, the fact that Fibreboard retains most of its equity under the Global Settlement is irrelevant to the propriety of mandatory class certification. The Court need not ensure that a defendant designate a particular

source of its assets to satisfy the class' claims; the Court need only determine whether the amount recovered by the class is fair. Drexel, 960 F.2d at 293. There is no authority or reason why Class Counsel may settle a 23(b)(1)(B) class action only if all of the defendant's resources are included in the settlement. Such a rule would make no sense, would discourage settlements and has been rejected. See, e.g., In re Granada, 803 F.Supp. at 1244; Bush, [1986-87 Transfer Binder] Fed.Sec.L.Rep. (CCH) P 92,999. In terms of the expected recovery for class members, the Global Settlement is far superior to either the Trilateral Settlement or to no settlement at all.

FAIRNESS ISSUES

Federal Rule of Civil Procedure 23(e) requires the Court to determine whether a class action settlement is "fair, adequate, and reasonable." Parker v. Anderson, 667 F.2d 1204, 1209 (5th Cir.), cert. denied, 459 U.S. 828, 103 S.Ct. 63, 74 L.Ed.2d 65 (1982); In re Corrugated Container Antitrust Litigation, 643 F.2d at 207. The Court cannot modify the terms of the proposed settlement; rather, the Court must approve or disapprove of the proposed settlement "as a whole." See, e.g., Evans v. Jeff D., 475 U.S. 717, 727, 106 S.Ct. 1531, 1537, 89 L.Ed.2d 747 (1986); Holmes v. Continental Can Co., 706 F.2d 1144, 1160 (11th Cir.1983); Cotton v. Hinton, 559 F.2d 1326, 1331-32 (5th Cir.1977). There is a strong presumption in favor of the settlement's fairness. Parker, 667 F.2d at 1209; Cotton v. Hinton, 559 F.2d at 1331; Mashburn v. National Healthcare, Inc., 684 F.Supp. 660, 667 (M.D.Ala.1988); Manual for Complex Litigation, s 30.41 (2nd ed. 1985).

The proposed settlement is not required to "achieve some hypothetical standard constructed by imagining every benefit that might someday be obtained in contested litigation." United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826, 850 (5th Cir.1975). Rather, "compromise is the essence of settlement," and the Court may "rely upon the judgment of experienced counsel for the parties." Cotton, 559 F.2d at 1330 (some citations omitted).

A. The *Reed* Factors

The Fifth Circuit has set forth six factors to guide the Court's assessment of the fairness, reasonableness and adequacy of a proposed class- action settlement:

> (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of class counsel, class representatives and absent class members.

Reed v. General Motors Corp., 703 F.2d 170, 172 (5th Cir.1983). All factors support approval of the Global Settlement here.

Asbestos litigation is undoubtably the most "mature" of all mass tort litigation. The primary factual and legal issues such as disease causation, product, jobsite and defendant identification and standard of care have been identified and

developed through extensive litigation. Despite the maturity of asbestos litigation, it continues to be expensive, time-consuming, and complex. The problem now is that asbestos litigation has become over-mature. Issues that have already been fully developed and resolved are nonetheless rehashed and relitigated, all contributing to the delay, high transaction costs, and arbitrary results that have become the hallmarks of asbestos litigation.

At the time the Global Settlement was reached, Class Counsel were thoroughly familiar with asbestos litigation in general and with Fibreboard's situation in particular, and were extremely well-equipped to represent the interests of the Class. The Global Settlement was the result of hard fought, arm's-length negotiations among the Settling Parties. Indeed, those negotiations were frequently contentious and even bitter. At numerous points the negotiations broke down and were almost scuttled entirely. Not until December 23, 1993, when the written Global Settlement Agreement was signed, was it clear that a final agreement would actually be reached. The record contains no evidence of collusion, and establishes that the Global Settlement amount of $1.535 billion is well within the range of values the Court could properly approve as a fair and reasonable compromise. Very few objections to the settlement have been asserted, despite the extremely extensive notice campaign that was conducted in connection with it, at a cost of more than $22 million. It is highly unlikely that the Insurers or Fibreboard would have agreed to pay more than the amounts they agreed to pay in the Global Settlement, and the Court is satisfied that the Global Settlement is fair, reasonable and adequate.

B. The Alternatives

It is appropriate in assessing the fairness of a class settlement to compare the risks and rewards of the Global Settlement with other possible outcomes. While there is no way to predict Fibreboard's future asbestos liability with any certainty, the Court can, based on the work of the experts and the views of counsel, assess the risks to the Class associated with each of the three basic "scenarios" that are presented by the record: the "Coverage Case scenario"; the "Trilateral Settlement scenario"; and the "Global Settlement scenario."

The Coverage Case scenario assumes that neither the Global Settlement nor the Trilateral Settlement receives final court approval and the Coverage Case is prosecuted to a conclusion in the California courts. Under this scenario, there is a significant risk that Fibreboard will be left either with no relevant insurance coverage at all or with coverage for only a small fraction of its total asbestos-related personal injury liability. In that event, Fibreboard would at best be able to meet only a small portion of its total liability to the Global Health Claimant Class, and that allowance of individual, "first come, first served" actions and adjudications with respect to Global Health Claimant Class members' claims would rapidly exhaust all available assets and would leave the great bulk of the class uncompensated.

Even a total win in the Coverage Case would not guarantee that the Class would be fully compensated. There is a significant risk that Fibreboard's assignment settlement program may have entirely vitiated the Continental insurance, which would leave Fibreboard with only several hundred million

dollars to cover both pre- and post-1959 claims. Any such outcome would guarantee, again, a massive shortfall in funds to compensate the Global Health Claimant Class--and therewith a substantial misallocation of Fibreboard's resources in the event individual actions and adjudications with respect to class member claims were permitted.

And even if Fibreboard were to win in the Coverage Case and Fibreboard's right to engage in the assignment settlement program were upheld so that Fibreboard had unlimited coverage for pre-1959 cases, the post-1959 cases, for which Fibreboard would be solely responsible, would sooner or later drive Fibreboard into bankruptcy. Transaction and indemnity costs would quickly consume Fibreboard's relatively modest assets. If Fibreboard were able to obtain the necessary court orders to effect the Pacific II Agreement, its demise might be delayed a few years, but it would not be averted. Fibreboard's bankruptcy would be a disaster for the post-1959s, and for the pre-1959s it would prove to be at least a major and expensive inconvenience.

In comparing the Coverage Case scenario with the Trilateral Settlement, the question is whether--from the standpoint of class members--it is preferable to (i) accept the known terms and benefits of the Trilateral Settlement (foremost of which is a $2 billion payment to Fibreboard from the Insurers); or (ii) gamble on both the outcome of the Coverage Case appeal and the possibility, regardless of the outcome of that appeal, that Fibreboard would be found to have vitiated its coverage under the Continental policy by its assignment settlement program. Given the extent of those risks, and--given Fibreboard's limited non-insurance assets--the devastating effect

that such outcomes would have on class members, the Trilateral Settlement is superior to no settlement at all.

Although the Trilateral Settlement scenario eliminates the risk of the Coverage Case, it is nevertheless problematical for the Global Health Claimant Class. There is a significant risk that the Trilateral Settlement (even augmented by Fibreboard's non-insurance assets) would leave a "late-comer" component of the Class without compensation in the event individual actions and adjudications with respect to class member claims were to be permitted.

Under the Global Settlement scenario, although there are substantial uncertainties involved, and although there is a significant risk--more than a mere possibility--that there will be a shortfall, all Class claims will more likely than not be paid at fair and appropriate values, although it is possible some claims may have to be deferred for some time pursuant to the spendthrift provisions of the Trust.

The funds provided under the Global Settlement are approximately equivalent to the funds available to resolve those claims under the Trilateral Settlement, after allowance is made for resolution of unsettled present claims and other items under the Trilateral Settlement. Under the Trilateral Settlement, however, Fibreboard's non-insurance assets are reachable by asbestos claimants. But this does not mean that more money will actually reach asbestos claimants under the Trilateral Settlement. Fibreboard's total sale value free of all its asbestos liabilities is only $235 million, which is considerably less than the likely savings in defense costs under the Global Settlement. In fact, taking into account the substantially lowe. transaction costs

under the Global Settlement, the Global Settlement will provide substantially more money--at least hundreds of millions of dollars--that actually reaches class members for compensation of their claims than will be provided to them under the Trilateral Settlement. And although there is some risk under the Global Settlement that there will be insufficient funds to compensate all class members, under the Trilateral Settlement there is a substantial likelihood that the funds will be insufficient to compensate all class members. Under the Global Settlement, the operation of the Trust will result in a far more cost-effective system that promotes the settlement of claims rather than the defense of them. If the Global Settlement is not ultimately approved, the only winner will be the asbestos litigation industry--lawyers on both sides, doctors, consultants, other expert witnesses, etc.--which has historically consumed as much as 63 cents of each asbestos litigation dollar. See Institute for Civil Justice Annual Report, April 1, 1990-March 31, 1991 (RAND).

Under the efficient claims administration and resolution procedures of the Trust, all transaction costs would likely constitute less than 15% of total Trust outlays. Under the Trilateral Settlement, there is a substantial likelihood that Fibreboard would spend a significant portion of the monies made available to it pursuant to the Trilateral Settlement on defense costs in an effort to achieve its litigation goals. Indeed, in the initial years under the Trilateral Settlement regime it is likely that Fibreboard would expend more of the Trilateral Settlement funds on defense costs than on indemnity payments to claimants.

Moreover, under the Global Settlement, claimants' attorneys' fees are limited to 25% of a claimant's recovery against the Trust--in contrast to the 33%-40% fees claimants' attorneys would often recover under the Trilateral Settlement--thus increasing the compensation that is provided to claimants rather than to their lawyers.

Additionally, under the Global Settlement, the operation of the Trust will result in a far more efficient and equitable system of administering claims and compensating claimants. A claim against the Trust will, on average, be processed and resolved much more quickly than a similar claim would be processed and resolved in the tort system under the Trilateral Settlement. As or more importantly, operation of the Trust under the Global Settlement will provide a fair method for compensating claimants that is more efficient and less burdensome than those claimants would experience under the tort system.

CONCLUSION

In sum, the Global Settlement, like all of the settlements involved in this action, is fair, reasonable, and adequate, and inheres to the substantial benefit of its subject class. The Global Settlement is the product of hard- fought arms-length negotiations by competent counsel, and the amount of the settlement is easily within the range of values that the Court could approve. Under the facts of this case, a mandatory, non-opt-out class action is not only an appropriate vehicle to effect the settlement, it is the only way that the settlement could be accomplished. The Global Settlement is better both for the Class and for Fibreboard than the Trilateral Settlement, and both

the Global Settlement and the Trilateral Settlement are far superior to the Coverage Case scenario. This Court sees no reason why the Global Settlement should not be approved.

The Court on this date also enters its Findings of Fact and Conclusions of Law and the various judgments that collectively reflect the Court's approval of the Global Settlement. What remains is for the Court to review the Report and Recommendation of the magistrate judge regarding attorneys' fees and any objections that may be lodged against it.

The Court would be remiss if it did not note that the attorneys for Fibreboard, Continental, Pacific, the Class, the Ortiz Intervenors and the Ad Litems have performed their tasks in the best tradition of this old and honored profession.

(3)

Supreme Court, U.S.
FILED

No. 97 1704 APR 17 1998

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1997

ESTEBAN ORTIZ, ET AL.,
Petitioners

v.

FIBREBOARD CORPORATION, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME II (Pp. 243 - 468)

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

GERALD AHEARN, JAMES DENNIS, CHARLES W. JEEP, JAMES ELLISON and WILLIAM JAMES MITCHELL, on Behalf of Themselves and Others Similarly Situated,
Plaintiffs
v.
FIBREBOARD CORPORATION and BETHLEHEM STEEL CORPORATION
Defendants,

CONTINENTAL CASUALTY COMPANY, CNA CASUALTY COMPANY OF CALIFORNIA, COLUMBIA CASUALTY COMPANY and PACIFIC INDEMNITY COMPANY, Defendant-Intervenors.

OWENS-ILLINOIS, INC., on Behalf of Itself and Others Similarly Situated,
Additional Counterclaim Defendant.

: Civil Action
: No. 6:93cv526

FINDINGS OF FACT

July 27, 1995

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FINDINGS OF FACT

The Court makes the following preliminary findings of fact:[1]

I. INTRODUCTION

1. This is a class action commenced in connection with a settlement of contested and threatened litigation pursuant to Fed. R. Civ. P. 23(b). The agreements now before the Court for approval reflect a settlement among parties who have aggressively asserted and controverted the rights and claims that will be finally compromised and settled if the Court enters a final judgment. As detailed below, there has been nothing feigned or collusive about the negotiations that brought the parties to court. The disputes among the parties are real and, unless the settlement is approved, those disputes will continue. The controversies between the litigants are not moot. The disputes tendered for resolution are ripe and the parties have properly presented the requested adjudication of rights by this Court.

2. The principal parties to this litigation are the following:

-- Gerald Ahearn, James Dennis, Charles W. Jeep, James Ellison and William

[1]To the extent the following findings of fact include conclusions of law or mixed findings of fact and conclusions of law, those findings and conclusions are hereby adopted by this Court.

James Mitchell, the class representatives of the plaintiff and defendant asbestos health claimant classes in this action (the "Global Health Claimant Class").[2]

-- Fibreboard Corporation ("Fibreboard"), which manufactured and distributed asbestos-containing products from the 1920s until 1971. See Findings of Fact ¶ 24.

-- Continental Casualty Company ("Continental"), CNA Casualty Company of California and Columbia Casualty Company, which issued general liability policies to Fibreboard. See Findings of Fact ¶ 37.

-- Pacific Indemnity Company ("Pacific"), which Fibreboard alleges issued it a general liability policy. See Findings of Fact ¶ 37. (Continental and Pacific are sometimes collectively referred to herein as the "Insurers.")

-- Owens-Illinois, Inc. ("Owens-Illinois"), the class representative of a defendant

[2]The formal definition of the Global Health Claimant Class is set forth in this Court's Order Finally Certifying Plaintiff and Defendant Classes.

class of third-party claimants (the "Global Third-Party Claimant Class").[3]

-- Bethlehem Steel Corporation ("Bethlehem"), the class representative of a defendant class of certain employers and insurers (the "Longshore Defendant Class").[4]

-- Esteban Yanez Ortiz, Marion Behee, Paul Cochran, Edee Cochran, Ida Beck, John R. Allgood, Henry Evers and Lester E. Taylor (the "Ortiz Interveors"), intervenors represented by the law firm of Baron & Budd, who have objected to this settlement.

-- James Flanagan and David H. Middleton (the "Flanagan Intervenors"), intervenors represented by the Maritime Asbestos Legal Clinic, a Division of the Jaques Admiralty Law Firm, who have objected to this settlement.

3. Diversity of citizenship is present and is uncontested. Each class member alleges, in good faith, entitlement to damages in excess of $50,000, exclusive of

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[3]The formal definition of the Global Third-Party Claimant Class is set forth in this Court's Order Finally Certifying Plaintiff and Defendant Classes.

[4]The formal definition of the Longshore Defendant Class is set forth in this Court's Order Finally Certifying Plaintiff and Defendant Classes.

interest and costs. This Court has subject matter jurisdiction over these proceedings.

4. Each member of the Global Health Claimant Class alleges exposure to asbestos, a well-documented human carcinogen, and therefore an increased risk of contracting cancer. In re Joint Eastern and Southern District Asbestos Litigation ("Manville"), 129 B.R. 710, 739-40 (E. & S.D.N.Y. 1991), vacated, 982 F.2d 721 (2d Cir. 1992); Tr. at 544.[5] A number of courts, including the trial court in the coverage litigation between Fibreboard and the Insurers, have found that exposure to asbestos causes injury at the cellular level.[6] See, e.g., Carlough v. Amchem Products, Inc., 834 F. Supp. 1437, 1454 (E.D. Pa. 1993). Accordingly, each member of the Global Health Claimant Class alleges injury-in-fact sufficient to confer standing.

5. Those members of the Global Health Claimant Class who have been exposed to asbestos, but who have not yet developed recognizable disease or injury, seek, inter alia, damages to compensate for fear of cancer and for enhanced risk of developing cancer, damages tied to the need to undergo medical monitoring to detect the early development of asbestos-related disease, and punitive damages. The Court takes judicial notice that it is not at all uncommon that asbestos plaintiffs recover jury verdicts substantially in excess of $50,000

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[5]Citations to "Tr. at ___" are to the daily transcript of the fairness hearings conducted herein.

[6]In making this finding, however, the Court in no way finds that such cellular or subclinical injury is sufficient to constitute "bodily injury" within the meaning of insurance policies.

notwithstanding the absence of disability or medical impairment, typically in pleural thickening cases. Each Global Health Claimant Class member, including each so-called "exposure-only" claimant, has a good faith basis for arguing for application of authorities permitting recovery for fear of cancer, risk of cancer and medical monitoring. See, e.g., Potter v. Firestone Tire and Rubber Co., 863 P.2d 795, 816 (Cal. 1993); Miranda v. Shell Oil Co., 15 Cal. Rptr. 2d 569 (Cal. Ct. App. 1993); Barras v. Monsanto Co., 831 S.W.2d 859 (Tex.App.- -Houston [14 Dist.] 1992, writ denied). Fibreboard's headquarters are located in California, Fibreboard Exh. 706, a state that recognizes claims for medical monitoring and fear of cancer. Accordingly, such claims could be asserted against Fibreboard by all members of the Global Health Claimant Class.

II. HISTORY OF ASBESTOS LITIGATION

A. General Background

6. Asbestos-related personal injury and wrongful death litigation began in the courts of East Texas in the late 1960s. The first modern-day asbestos-related personal injury case in this country was brought in this Court in 1967 by Claude Tomplait against Fibreboard and other defendants. Trial resulted in a verdict in favor of the defendants. Tr. at 60. It is generally accepted that the tide of asbestos-related injury litigation flooding the nation's courts today turned on the result in the Borel case, an action filed in the Beaumont Division of thisCourt in 1969. Tr. at 131. All Borel defendants, including Fibreboard, were held liable, and on appeal the Fifth Circuit affirmed. Borel v. Fibreboard Paper Products Corporation, 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974).

7. Following Borel, and through the late 1970s, plaintiffs' counsel around the country crafted theories of liability against the asbestos defendants they had identified, the primary target being Johns-Manville, Inc. ("Manville"). Plaintiffs' counsel conducted discovery, assembled a mass of documents bearing on liability that are now well known to every experienced asbestos judge, and identified the various medical conditions that could be forensically attributed to asbestos exposure. Tr. at 128, 131-32, 937-38; Fibreboard Exh. 102 at vii; Manville, supra, 129 B.R. at 743-45.

8. By the mid-1980s, the fundamental legal theories and liability cases against the early defendants, including Fibreboard, had been established, and litigation against these companies intensified dramatically. Class Plaintiffs Exh. 1014; Tr. at 133; Manville, supra, 129 B.R. at 745-51; Class Plaintiffs Exh. 1014 (Transcript of Deposition of Lawrence Fitzpatrick, Feb. 22, 1994, Georgine v. Amchem Products, Inc., Civil Action No. 93- 215 (E.D. Pa.) ("Fitzpatrick Tr.")) at 72-76.

9. Facing enormous liabilities and overwhelming defense costs, many defendants ended up in bankruptcy, including a number of companies previously considered to be immune fromfinancial difficulty. See In re Asbestos Products Liability Litigation, 771 F. Supp. 415, 420 (J.P.M.L. 1991). Beginning in 1982 with Unarco Industries, Inc. and Manville, the list of corporate asbestos bankrupts now includes such defendants as Celotex Corporation, Eagle-Picher Industries, Inc., H.K. Porter Company, Inc., Keene Corporation, National Gypsum Company, Forty-Eight Insulations, Inc., and Raymark Industries, Inc. Fibreboard Exh. 919, Tab 4.

10. Before it entered bankruptcy, Manville, which had supplied the largest share of asbestos-containing products, basically controlled the defense of asbestos litigation na- tionwide. Fitzpatrick Tr. at 74. Manville paid on an aggregate basis approximately 30% to 33% of the funds paid in asbestos settlements. After Manville entered bankruptcy in 1982, and stopped paying money in asbestos cases, other asbestos defendants generally believed that they did not receive settlement credits or set-offs reflecting Manville's share. Tr. at 132-34, 1133-34; Fibreboard Exh. 100 at 5.

11. As asbestos-related personal injury litigation mushroomed in the 1980s, asbestos dockets across the country grew exponentially, and plaintiffs in many jurisdictions began to face substantial delays in having their claims resolved. Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation ("Asbestos Ad Hoc Committee Report") at 7-12 (1991) (Class Plaintiffs Exh. 1003). Transaction costs outpaced compensation to victims. Id. at 12-14. Rand Corporation studies in 1983 through 1985 found that only 37% to 39% of money paid by asbestos defendants actually went to victims, with 61% to 63% consumed by transaction costs. Fibreboard Exhs. 100-102.

12. Asbestos litigation constitutes "an unparalleled situation in American tort law." In re School Asbestos Liti- gation, 789 F.2d 996, 1000 (3d Cir.), cert. denied, 479 U.S. 852 (1986). Citing the Asbestos Ad Hoc Committee Report, the Judicial Panel for Multidistrict Litigation summarized what it termed the "most objectionable aspect of asbestos litigation":

> dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

In re Asbestos Products Liability Litigation, supra, 771 F. Supp. at 419 (citing Asbestos Ad Hoc Committee Report at 1-3).

13. By 1986, counsel, commentators and courts began to recognize the enormous problems facing all involved in asbestos litigation. In 1987, the Federal Judicial Center convened a conference to discuss the asbestos litigation crisis and the need for some type of overarching resolution. The conference included judges with significant asbestos dockets across the country and some leading members of the asbestos plaintiffs' bar. Participants addressed many of the conditions outlined above, including the growing backlog of cases, the fact that new cases were being filed at a much greater rate than existing cases could be tried or settled, the fact that transaction costs greatly outweighed the victims' recoveries, and the growing number of bankrupt defendants. Fitzpatrick Tr. at 72-77. Despite the widespread recognition of these problems, the asbestos crisis continued to worsen. By 1990, overwhelmed asbestos courts had turned to novel mass adjudication techniques. Fibreboard Exhs. 104, 105, 107-117, 120-124.

14. In 1990, the Federal Judicial Center convened another conference of judges, academics and counsel to address the continuing issues related to asbestos litigation.

This took place at the Dolley Madison House in Washington, D.C. The 1990 Federal Judicial Center conference was a significant event in the history of asbestos-related litigation. Many of those involved, including counsel for Fibreboard, came away with a clear impression that "business as usual" would not be a judicially acceptable solution to the problem. Tr. at 211; Fitzpatrick Tr. at 82-84.

15. In the wake of the 1990 conference, members of the asbestos bar and the judiciary took preliminary steps to- ward national action on the asbestos problem. A number of federal judges organized to explore class action treatment of the problem. Fitzpatrick Tr. at 84-86.

16. In July 1990, some leading members of the asbestos plaintiffs' bar filed a class action in this Court pursuant to Fed. R. Civ. P. 23(b)(1)(B), Linscomb v. Pittsburgh Corning Corp., et al. The action was commenced on behalf of all persons (present and future) with asbestos- related personal injury claims. Many of the major asbestos defendants were sued in Linscomb, including Fibreboard. Fibreboard Exh. 116. Preliminary proceedings were conducted in this Court on Linscomb in the summer of 1990. Steering committees were formed. Ronald Motley and Joseph F. Rice, of the law firm Ness, Motley, Loadholt, Richardson & Poole ("Ness Motley") were appointed to the steering committee, and Mr. Motley was designated as one of the coordinating counsel for the plaintiffs. The parties conducted settlement meetings and explored whether an overall solution to asbestos injury litigation could be found. Fitzpatrick Tr. at 87-89; Class Plaintiffs Exh. 1002; Fibreboard Exh. 117.

17. In September 1990, Chief Justice Rehnquist appointed a panel, the Judicial Conference Ad Hoc Committee on Asbestos Litigation ("Asbestos Ad Hoc Committee"), to study asbestos litigation and make recommendations. In November 1990, eight federal district judges with significant asbestos experience sent a letter to the Judicial Panel for Multidistrict Litigation ("MDL Panel"). They urged the MDL Panel to reverse its several prior rulings declining requested MDL transfers, and asked that the MDL Panel consolidate all federal asbestos litigation in a single judicial district. These judges argued that consolidation would, among other things, "facilitate global settlements," and allow the transferee court to "fully explore . . . national disposition techniques such as classes and sub-classes under Rule 23." Fibreboard Exh. 118; Fitzpatrick Tr. at 93-95.

18. In March 1991, the Asbestos Ad Hoc Committee issued its report. Class Plaintiffs Exh. 1003. The report has been described as a "ringing condemnation" of the treatment of asbestos claims in the tort system. See Georgine v. Amchem Products, Inc., 157 F.R.D. 246, 265 (E.D. Pa. 1994). The Asbestos Ad Hoc Committee stated:

> [T]he [asbestos] situation has reached critical dimensions and is getting worse. What has been a frustrating problem is becoming a disaster of major proportions to both the victims and the producers of asbestos products, which the courts are ill-equipped to meet effectively. Asbestos Ad Hoc Committee Report at 2.

19. The Asbestos Ad Hoc Committee also expressed its hope that some alternative dispute resolution mechanism for processing asbestos claims could be fashioned. Id. at 14. It concluded, id. at 10, that:

> The volume and complexity of asbestos cases have resulted in the violation of a basic tenet of American justice and the spirit of the Civil Justice Reform Act of 1990: speedy and inexpensive resolution of cases.

20. On July 29, 1991, the MDL Panel issued an order transferring all federal personal injury asbestos litigation to Judge Weiner of the Eastern District of Pennsylvania for coordinated or consolidated pretrial proceedings.[7] In re Asbestos Products Liability Litigation, supra, 771 F. Supp. 415. The MDL Panel voiced its hope that the MDL transfer might foster global settlements of the "asbestos mess," noting that transfer "offer[s] a great opportunity to all participants who sincerely wish to resolve these asbestos matters fairly and with as little unnecessary expense as possible." Id. at 424. At the time of the MDL transfer, almost 30,000 asbestos-related personal injury claims

[7]In the hearing before the MDL Panel, the majority of the plaintiffs' bar had favored the Eastern District of Texas as the transferee forum in connection with the MDL proceedings, if there was to be a transfer of cases. Fitzpatrick Tr. at 95. It is a matter of common knowledge that asbestos claimants from across the country, and from outside the United States, frequently select courts in Texas -- and this District in particular -- as the venue in which to pursue their asbestos personal injury actions. The Court notes that substantial numbers of the most recent asbestos personal injury filings against Fibreboard in Texas by the Baron & Budd firm, counsel for the Ortiz Intervenors, were apparently on behalf of residents of states other than Texas. Fibreboard Exh. 824.

were pending in the federal courts, with two times that number pending in the state courts. Id. at 416, 421. Linscomb was transferred to Judge Weiner as part of the MDL proceedings.

21. After the MDL transfer, Judge Weiner appointed plaintiffs' and defendants' steering committees for the MDL litigation, the members of which included Ronald Motley, of Ness Motley, as one of the co-lead counsel of the Plaintiffs' Steering Committee; Steven Kazan, of the law firm Kazan, McClain, Edises & Simon, as a member of that committee; and Stephen M. Snyder,[8] counsel for Fibreboard, as a member of the Defendants' Steering Committee. Judge Weiner made clear that he wanted the litigants to solve the asbestos crisis on a global basis. Tr. at 125; Fitzpatrick Tr. at 99-100, 110-11.

22. Settlement negotiations began between the Plaintiffs' and Defendants' Steering Committees in the MDL litigation. The parties made substantial efforts at global negotiations involving all plaintiffs and all defendants. Tr. at 221. The primary purpose of the MDL settlement talks was to craft a national settlement that would provide an alternative resolution mechanism for asbestos claims. Judge Weiner encouraged these global settlement negotiations. Fitzpatrick Tr. at 110-11. These talks did not result in a global settlement,

[8]Mr. Snyder is a partner in the San Francisco law firm Brobeck, Phleger & Harrison. Tr. at 118. Since the early 1980's, Mr. Snyder's representation has focused on asbestos litigation defense and, in particular, the defense of Fibreboard. Tr. at 118. Between 1985 and 1988, he represented the members of the Asbestos Claims Facility in northern California, and served on a number of national committees of that organization. Since 1988, he has been Fibreboard's national counsel for defense of asbestos bodily injury cases. Tr. at 120-23.

Fitzpatrick Tr. at 114-17, but they did serve as a springboard for other, less inclusive negotiations, including those that resulted in a settlement between asbestos victims and defendants who had formed the Center for Claims Resolution ("CCR"), a claims handling facility created in late 1988 in the wake of the dissolution of a similar organization, the Asbestos Claims Facility. See Georgine, supra, 157 F.R.D. at 266-67. Fibreboard had a difficult time fitting itself into the MDL-related settlement talks because it had no cash with which to make settlements. Tr. at 221.

23. At the time of the settlement negotiations un- derlying this class action, asbestos litigation was probably the most "mature" mass tort litigation in this country: i.e., the liability and medical issues pertinent to such litigation had been the subject of thorough and repeated discovery, trial and settlement. Georgine, supra, 157 F.R.D. at 321-22; F. McGovern, Resolving Mature Mass Tort Litigation, 69 B.U. L. Rev. 659 (1989). The results of this experience were known to counsel for the plaintiff class in this action, as well as to counsel for Fibreboard and, to some lesser extent, its insurers. Tr. at 937-38, 2162, 2720.

B. Fibreboard Background

24. As asbestos-related defendants were sued on a regular basis, Fibreboard became known as an "all-years" defendant because its asbestos-containing products had been distributed from the 1920s until 1971, when it ceased producing asbestos-containing products. Tr. at 127-28. In contrast, some defendants are generally recognized to bear liability for exposure to asbestos that occurred only during certain periods of time. In

addition, Fibreboard was and is considered to be primarily a "pipe and boiler" defendant, in that its products frequently were used in high-temperature industrial applications involving shipyards, boiler rooms, shops, refineries, and similar applications. Most other defendants were primarily manufacturers of asbestos-containing roofing products, construction materials and linoleum flooring. Tr. at 128. Fibreboard became known as a regional defendant because its primary manufacturing facilities and distribution networks during most of the relevant years were in California. Fibreboard had a primary exposure to liability in West Coast and Gulf Coast (especially Texas) cases, rather than in cases in the East. Tr. at 128, 131, 2448-49.

25. In 1983, Fibreboard suffered its first punitive damages verdict. Tr. at 118, 400. Nonetheless, perhaps be- cause there is no "treasure trove" of inculpatory Fibreboard documents, Tr. at 440, Fibreboard never became a punitive damages target defendant. Tr. at 400. With one exception, Fibreboard ultimately never paid a punitive damages judgment in connection with an asbestos personal injury claim. Tr. at 399; Fitzpatrick Tr. at 130.

26. Fibreboard generally experienced greater liability in cases of earlier exposure to asbestos than in cases of later exposure. That was because (i) Fibreboard had a greater share of the pipe and boiler insulation markets in the earlier years (i.e., before the mid-1950s) than in later years (i.e., the late 1950s and 1960s); (ii) the bankruptcy of other defendants with substantial liability exposures arising out of early years, such as Manville, Eagle-Picher and Celotex, had the greatest impact on defendants such as Fibreboard who also had liability for early-

years exposures; (iii) Fibreboard can produce evidence that it began to give warnings with respect to the health hazards of its products in 1966; and (iv) cases arising out of early exposures, such as those in World War II shipyards, tended to be more serious. Tr. at 129-31.

27. Fibreboard has employed different strategies to defend asbestos injury cases over time. Early on, like most defendants, Fibreboard relied on Manville to bear the brunt of the defense of cases. Tr. at 131. When Manville declared bankruptcy in 1982, Fibreboard had to rely totally on a then-existing interim agreement under which one of its insurance carriers, Fireman's Fund Insurance Company, provided Fibreboard with a defense of asbestos injury claims and paid indemnity as necessary. Tr. at 131-32.

28. Fibreboard joined the Asbestos Claims Facility ("ACF"), which began operations in 1985. The formation of the ACF was an effort by more than 30 companies that faced asbestos claims, and by some of their insurers, to create a mechanism to resolve asbestos-related claims through unified claims handling and joint representation in asbestos-related personal injury litigation. The general operation of the ACF (also known as the Wellington Facility, after Dean Wellington of the Yale University Law School, who assisted in the negotiations leading to its formation), is well known by the Court and is described in a number of judicial opinions. See, e.g., Unigard Security Insurance Company, Inc. v. North River Insurance Co., 4 F.3d 1049, 1056 (2d Cir. 1993) (internal citations omitted):

> As a result of the massive liability for asbestos-related claims, the expense of litigation between producers and their insurers, and the administrative costs of managing nationwide litigation and claims, an agreement concerning asbestos-related claims, known as the Wellington Agreement, was signed by producers of asbestos and their insurers on June 19, 1985. . . . The Agreement established the Asbestos Claims Facility ("the Facility") to "administer and arrange for the evaluation, settlement, payment or defense of all asbestos-related claims against Subscribing Producers and Subscribing Insurers in accordance with the provisions of the Agreement. . . ." Moreover, as "sole agent, the Facility [had] exclusive authority and discretion to administer, evaluate, settle, pay or defend all asbestos-related claims."
>
> Once the Facility settled a claim, the liability amount and the defense costs were allocated among the producers of asbestos . . . according to a producer-allocation formula. The producer-allocation formula was actually two formulae, one for indemnity (or to pay the annual claim) and one for defense costs. "To share indemnity, each producer's historical average cost by state was multiplied by that producer's pending claims in that state. And the product was summed and a percentage was determined for each producer as a total of all producers." Regarding "defense costs, the allocation was derived by taking each

producer's number of pending claims, divided by the total number of pending claims for all producers combined."

29. The ACF was an insurance settlement. Fibreboard settled policy disputes with certain of its insurers -- but not with Continental or Pacific -- in order to enter the ACF. Tr. at 138. Producer members of the ACF, including Fibreboard, received a complete defense and indemnity with respect to claims for compensatory damages, even though they may have had gaps in their insurance coverage.

30. When Fibreboard entered the ACF, it anticipated that defense costs and indemnity levels would be kept within reasonable limits, and filings of cases in which the claimant did not appear to have any significant disease would be minimized. Tr. at 144. During ACF operations (June 1985 to September 1988), its members enjoyed lower defense costs because the number of defense counsel serving ACF members in asbestos cases fell from as many as 1,200 law firms to approximately 65 firms. Tr. at 139; Fibreboard Exh. 102 at 31. Within the ACF, Fibreboard paid close to 13% of all settlements made on behalf of any member. Tr. at 140.

31. In the Western United States there was some success from Fibreboard's perspective in reducing filings of claims by "non-impaired" claimants, i.e., people with some exposure to asbestos who had no significant medical impairment or disability, and indemnity values in other types of cases were kept within reasonable limits. This was accomplished by means of an expensive, labor-intensive litigation effort involving considerable trial activity. However, these results were not

obtained elsewhere for Fibreboard within the ACF, and the filing of asbestos claims against Fibreboard in the Eastern United States and in Texas increased substantially during the ACF years. Tr. at 143-46. In the end, ACF membership overall did not achieve the results Fibreboard desired on liability and case control issues.

32. In fact, ACF membership drew Fibreboard into types of cases and into jurisdictions where it previously had not been sued and Fibreboard became a "national" defendant sued in regions of the country and in segments of asbestos litigation in which it had not faced liability previously. The result was to double Fibreboard's exposure, even though the facts giving rise to that exposure remained unchanged. Tr. at 136-37, 2669-70, 2679-80.

33. Filings of new asbestos-related cases against Fibreboard in 1982 through 1984 were in the range of 4,500 to 5,000 cases per year. With rumors that the ACF might be established, and upon its advent in June 1985, filings of such cases increased to over 8,000 in 1985. In the remaining full years of the ACF -- 1986 and 1987 -- filings stayed at a high level, in the range of 13,000 to 17,000 cases per year. Tr. at 136.

34. When the ACF ceased operations in October 1988, Fibreboard no longer had any right to a defense or payment of indemnity by Fireman's Fund because the limits of that insurance coverage had been exhausted. Tr. at 148-49. Fibreboard had no insurance assets except for the proceeds of two settlements with the American Insurance Group of Companies ("AIG") and with Home Insurance Company,

totaling approximately $100 million, and the coverage provided by policies issued by Continental and Pacific that was disputed by the Insurers in then pending litigation. Tr. at 148-49. When it left the ACF, Fibreboard did not have enough cash to pay settlements of asbestos injury cases, Tr. at 153, and Fibreboard's ability to mount a defense was greatly reduced because it had no insurance coverage for defense, it had insufficient funds to pay for defense, and it faced a difficult time putting together a national network of defense counsel in cooperation with other former ACF members who were at odds with one another in the wake of the difficult process of disbanding the ACF. Tr. at 149-50.

35. From before the time it entered the ACF in 1985, and to this day, Fibreboard's corporate goal was, and has been, to manage and resolve its asbestos liabilities within its available insurance resources. Tr. at 144.

III. FIBREBOARD INSURANCE COVERAGE LITIGATION AND ATTENDANT RISKS

36. Fibreboard's insurance coverage litigation, which came to be captioned In re Asbestos Insurance Coverage Cases, Judicial Council Coordination Proceeding No. 1072 (the "Coverage Case"), commenced in 1979 when Fireman's Fund Insurance Company filed a complaint in San Francisco County Superior Court against Fibreboard and others, including Continental and Pacific. Fibreboard Exh. 203. Fibreboard's other insurers later became parties to this litigation. Fibreboard Exh. 204. In 1981, the action was coordinated with several separate asbestos coverage cases then pending in California. In 1983, Judge Ira A. Brown, Jr., was confirmed as

coordination trial judge. Fibreboard Exhs. 205-207. Judge Brown ordered the parties to produce all relevant documents as part of a massive discovery effort. Fibreboard Exhs. 208, 209, 211.

37. Fibreboard alleged that Pacific insured it from 1956 to 1957 under a no-aggregate-limit policy, but was unable to locate a copy of the policy. Pacific denied that the policy had no aggregate limit. Continental issued a comprehensive general liability policy to Fibreboard commencing in May 1957, which Fibreboard terminated effective March 15, 1959. The premium for this policy was less than $10,000 per year. The policy had no aggregate limit, but had a $1,000,000 per occurrence limit, and a $500,000 per claim limit. Fibreboard Exh. 201.

38. The Coverage Case was tried in several phases. The trial was one of the largest and most complex proceedings in the history of American civil jurisprudence, involving numerous insureds and insurers. Fibreboard Exh. 215 at 1340-42. Phase I involved the existence and terms of certain missing insurance policies, including the missing Pacific policy. Fibreboard was not involved in Phase II. Phase III involved the basic coverage provisions of the policies, including the trigger of coverage and scope of coverage. Phase IV involved multiple subphases, including Continental's "number of occurrences" issue, scope issues concerning whether the policy-holders should be required to contribute to claims costs, and the Insurers' contribution rights against each other. Fibreboard was not involved in Phase V. Fibreboard Exh. 223. At stake for Fibreboard and the Insurers was the question of whether Fibreboard would be determined to have no further insurance

coverage under the Continental and Pacific policies or, in stark contrast, virtually unlimited coverage under those policies.

39. In March 1985, a jury in Phase I of the Coverage Case trial found that Pacific had issued a one-year comprehensive general liability policy to Fibreboard's predecessor in 1956. The jury also found, by a nine to three vote based on a preponderance of the evidence standard of proof, that the policy had a $500,000 per claim limit, but no aggregate limit. Tr. at 138; Fibreboard Exh. 223.

40. The Phase III issues, including the trigger and scope of coverage, were tried and argued to the court between September 1985 and February 1987. In May 1987, Judge Brown issued a tentative decision in Phase III of the Coverage Case in favor of the policyholders. Fibreboard Exh. 219. He found that a "continuous" trigger existed, which meant that policy coverage applied to any claim where the claimant had been exposed to any asbestos prior to the expiration date of the policy. He thus rejected an "exposure only" trigger, under which a policy would respond only to claims as to which exposure to asbestos occurred during the policy period, and like- wise rejected a "manifestation" trigger, under which a policy would respond only to claims as to which injury became apparent during the policy period. The Insurers had taken various positions on trigger of coverage in the trial court. Pacific took the manifestation position and Continental took no position. Fibreboard Exh. 200. Judge Brown further found that the scope of each triggered policy extended to full responsibility for defense and indemnity on a claim within policy limits, and did not adopt a pro rata approach, which would have limited each insurer's responsibility to a proportion of the liability. In

addition, Judge Brown's scope decision did not obligate the policyholder to contribute for uninsured or underinsured periods. Fibreboard Exh. 219.

41. The Phase IV issues, including the number of occurrences and reserved scope issues, were tried to the Court in the Fall of 1987. Among other issues, Continental asserted that its policy had a maximum limit of $2,000,000 for Fibreboard's asbestos bodily injury claims because of its $1,000,000 per occurrence limit. Continental urged that there were only two occurrences under the policy, contending that "occurrence" referred to the sources of Fibreboard's asbestos-containing products, and only two Fibreboard plants had manufactured such products. In August 1988, Judge Brown issued a tentative decision in Phase IV of the Coverage Case. Judge Brown rejected Continental's contentions on the number of "occurrences," holding instead that each claim constituted a separate occurrence. Judge Brown also tentatively ruled that each triggered policy is responsible for the full costs of a claim, with the right to seek contribution from other triggered policies. Fibreboard Exh. 220.

42. On January 24, 1990, the trial court rendered judgment in the Coverage Case. Fibreboard Exh. 223. the judgment incorporated the jury's findings as to the existence and terms of the Pacific policy. It incorporated in substance the "continuous trigger" and "scope" rulings set forth in the Phase III tentative decision, and the "occurrence" ruling set forth in the Phase IV decision. Fibreboard Exhs. 222, 223. Judge Brown denied all motions for a new trial and for judgment notwithstanding the verdict. Fibreboard Exh. 224.

43. Insurers, including Continental and Pacific, appealed the trial court's decision in the Coverage Case, and the appeals were consolidated. The appellate record was extraordinarily voluminous. In November 1990, the California Court of Appeal issued an order calling for separate briefing by "issue groups." Appellate briefing took place between April and November 1991. Issue Group I included the Pacific missing policy issues. Pacific argued that the court should have instructed the jury that the burden of proof was by a "clear and convincing" standard rather than a "preponderance of the evidence" standard. Issue Group II addressed the basic coverage issues of the trigger and scope of coverage for asbestos bodily injury claims, as well as certain issues unique to Continental (the number of "occurrences" and the so- called "double anchor" question, viz., whether it was necessary that exposure and injury both occur during the policy period). Fibreboard Exhs. 225-242, 245, 246.

44. Oral argument upon the Coverage Case appeal was conducted in several phases during the Summer of 1993. Continental Exh. 23; Fibreboard Exhs. 243, 247. In late July 1993, the parties to the Coverage Case appeal were informed by the California Court of Appeal that oral argument upon the final phase of the appeal had been scheduled by that court for August 27, 1993, and, on that date, the final oral argument before the Court of Appeal in fact was heard. Tr. at 329, 1400-01, 1480-81; Fibreboard Exh. 248. On that same day an agreement in principle was announced in this Court with respect to the settlement that is now before this Court for consideration. Findings of Fact ¶ 179.

45. After the announcement of the global agreement in principle on August 27, 1993, the parties to that agreement wrote to the California Court of Appeal advising the court of the agreement in principle and asking that the court defer decision in the Coverage Case, at least with respect to those issues unique to Fibreboard and the Insurers pending the completion of the documentation necessary to consummate the settlement contemplated by the agreement in principle. Fibreboard Exhs. 249, 252.

46. On November 15, 1993, the California Court of Appeal issued an opinion substantially affirming a number of the principal aspects of the trial court's judgment in the Coverage Case, while reversing the trial court as to one such aspect that had been decided in Fibreboard's favor and against the Insurers. Fibreboard Exh. 254. However, the Court of Appeal simultaneously granted the joint motion of Fibreboard, Continental and Pacific to sever several insurance coverage issues unique to those parties, and to vacate submission of those issues pending further report to that court on the progress toward obtaining judicial approval of the settlement at bar. Tr. at 1497-98; Fibreboard Exh. 253. Accordingly, the disputes with respect to those severed coverage issues remain unruled upon by the California Court of Appeal, and their outcome thus remains uncertain even at the intermediate appellate level.

47. Requests for rehearing by the Court of Appeal as to the issues the Court of Appeal did decide were thereafter denied. Fibreboard Exh. 255. On January 27, 1994, the Insurers' petitions for review of the Court of Appeal's decision were granted by the California Supreme Court on a "grant and hold" basis, the effect of which is that the appeal is

presently held in abeyance while the California Supreme Court considers issues in other pending appeals that may be dispositive of issues in the Coverage Case. Tr. at 1498; Fibreboard Exhs. 256, 258, 259; Continental Exh. 5 at 10, ¶ 19.

48. Two expert witnesses, Justice Marcus M. Kaufman and Professor George Priest, testified at the fairness hearing in this action with respect to the issue of the risk -- viewed both as of August 27, 1993 and today -- that Fibreboard would lose the Coverage Case pending in the California appellate courts.[9] No objector proffered any witness, testimony or evidence to contradict or impeach in any way the conclusions provided by Justice Kaufman and Professor Priest.

49. Justice Kaufman[10] provided expert witness testimony on the uncertainty -- as of both August 27, 1993 and the present --as to how the appellate courts will resolve several legal questions in the Coverage Case that are either presently pending before the California Supreme Court or that were reserved for decision by the California Court of

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[9]The Court finds that the testimony of all of the witnesses offered in support of this settlement -- including that of Justice Kaufman and Professor Priest -- was credible.

[10]Justice Kaufman was in private practice from 1958 until 1970, specializing in civil litigation. He then served for seventeen years, from January 1970 until March 1987, as an Associate Justice of the California Court of Appeal, Fourth Appellate District, Second Division. From March 1987 until January 1990, he served as Associate Justice of the California Supreme Court by appointment of Governor George Deukmejian. Presently, he is of counsel to the law firm of Buchalter, Nemer, Fields & Younger. His practice consists principally of appellate litigation, often as a consulting expert, with special emphasis on insurance matters. Continental Exh. 5 at 1-2, ¶ 2.

Appeal. In particular, he focused on the likelihood that the California Supreme Court (or the Court of Appeal on the reserved issues) will or will not afford the Insurers relief on one or more of the coverage issues raised, on the likely timing of potential rulings in the Coverage Case, on the likely effect resolution of other cases now pending before the California Supreme Court will have on the Coverage Case, and on the California judicial process in general. Continental Exh. 5 at 2-3, ¶ 3.

50. Professor Priest[11] provided expert testimony on the likelihood, as of both August 27, 1993 and the present, that the California appellate courts would provide the Insurers relief on one or more of the coverage issues raised. The Court finds that both Justice Kaufman and Professor Priest are highly qualified experts in their fields, and finds their conclusions and reasoning to be persuasive.

51. According to Justice Kaufman, it is likely that the Supreme Court decided to "hold" the Coverage Case pending the outcome in Montrose Chemical Corp. v. Admiral Insurance, Co., 5 Cal. Rptr. 2d 356 (Cal. Ct. App. 1992), aff'd 1995 WL 389860, ___Cal. Rptr. 2d___ (1995), and/or Stonewall Ins. Co. v. City of Palos Verdes Estates, 9 Cal. Rptr.

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[11]Professor Priest is currently a Professor of Law at Yale University. Continental Exh. 6. The focus of his teaching and writing has been the study of the tort system, and, in particular, trends in tort and insurance law over the last 50 or 60 years, including recent developments. Tr. at 767. He has testified as an expert in both tort and insurance matters, including expert testimony about California insurance matters. Tr. at 767-68. Among his other duties at Yale, Professor Priest teaches a class on insurance, including an analysis of comprehensive general liability insurance policies and the California Supreme Court's approach to insurance matters. Tr. at 769-70.

2d 663 (Cal. Ct. App. 1992), review granted, 834 P.2d 1147 (Cal. 1992). According to Justice Kaufman, although not identical, both the Montrose and Stonewall cases involve "trigger of coverage" issues.[12] Stonewall also involves the "scope of coverage" issue. Continental Exh. 5 at 10, ¶ 19.

52. In addition, according to Justice Kaufman unless the California Supreme Court vacates the "grant and hold" status of the Coverage Case and either decides to hear the issues in the Coverage Case or dismisses review, it is likely that, once it has decided Montrose and/or Stonewall, the Supreme Court will remand the Coverage Case to the Court of Appeal. In that event, the Court of Appeal will be instructed to reconsider its Coverage Case opinion in light of the Supreme Court's Montrose and/or Stonewall decision(s), and the Court of Appeal will almost surely allow the parties the opportunity for further briefing and oral argument. The resulting decision of the Court of Appeal -- which would presumably also include the reserved issues -- would then be subject to another petition for review to the Supreme Court. Given the fact that Stonewall has not been set for oral argument yet, and the fact that after Montrose and Stonewall are finally decided a remand of the Coverage Case to the Court of Appeal followed by another petition for review to the Supreme Court is likely, Justice

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[12]On July 5, 1995, the California Supreme Court affirmed the appellate court's decision in Montrose. The supreme court noted the similarity of the trigger issue in the Coverage Case, but deemed it appropriate, given the unique nature of asbestos litigation, that trigger of coverage questions specifically involving asbestos claims be left for decision on an appropriate record in a case in which they are squarely presented. See Montrose Chemical Corp. of California v. Admiral Ins. Co., 1995 WL 389860 at n. 16, ___Cal. Rptr. 2d___, ___ n. 16 (1995).

Kaufman believes that the Coverage Case may not be finally concluded for five years or more. Continental Exh. 5 at 10-11, ¶ 20.

53. There are five issues currently before the California Supreme Court or the California Court of Appeal that have a significant bearing on the ultimate liability of Continental and Pacific to Fibreboard under their primary policies. These issues are commonly referred to as (i) trigger of coverage; (ii) scope of coverage; (iii) number of occurrences; (iv) double anchor; and (v) lost policy. Two of these issues -- trigger of coverage and scope of coverage -- involve both the Continental and Pacific policies. Two issues -- number of occurrences and double anchor -- involve only the Continental policy. The lost policy issue involves only the Pacific policy. Continental Exh. 5 at 11-12, ¶ 21.

54. The California trial court hearing the Coverage Case decided each of the five issues adversely to Continental and Pacific. Based on California law and the concerns and propensities of the California Supreme Court, however, it was the opinion of both Justice Kaufman and Professor Priest that as of August 27, 1993, there was a significant risk to Fibreboard that the California Supreme Court would render decisions on one or more of the coverage issues that would have the effect of either eliminating or substantially reducing further indemnity obligations by Continental and Pacific to Fibreboard for asbestos-related personal injury claims. It was also their opinion that the same risk exists today. Continental Ex. 5 at 12-46, ¶¶ 22-86; Tr. at 771-93.

55. Justice Kaufman's conclusions were based upon his analysis of (i) the policy language; (ii) the California Supreme Court 's current approach to the resolution of insurance coverage issues in particular and litigation in general; (iii) distinctions between the application of contract law pursuant to which insurance polices are to be interpreted and tort law under which an asbestos manufacturer's liability is determined; (iv) recent insurance cases either pending before or decided by the California Supreme Court or decided by other courts; and (v) recent California Supreme Court decisions in non-insurance cases. Continental Exh. 5.

56. Professor Priest focused on the trend of the law in both California and elsewhere against what he termed "enterprise liability." This trend includes interpreting insurance policies issues more narrowly in order to make insurance coverage more predictable and certain and therefore more available to consumers at reasonable prices. Tr. at 772- 91.

57. The Court finds that the risk attending the outcome of the Coverage Case was a matter of reasonable and substantial concern for counsel for all of the parties to the settlement at bar to have had, and to continue to have, and a legitimate factor and driving force in the negotiations that resulted in that settlement. Tr. at 792-93, 1056-59.

IV. FIBREBOARD'S RESPONSES TO ASBESTOS LITIGATION

A. The Fibreboard Structured Settlement Program

58. In August 1988, Fibreboard informed Continental that the ACF was dissolving, and contended that Continental was obliged to provide a defense in the asbestos injury cases being prosecuted against Fibreboard. Fibreboard Exhs. 400, 401. The ACF stopped operations and ceased providing a defense to its members in September 1988. Fibreboard had insurance proceeds of approximately $100 million available from settlements with AIG and with Home Insurance Company. Fibreboard's only other remaining insurance resources were the disputed coverages under the Pacific and Continental policies. Tr. at 148-49.

59. Upon dissolution of the ACF, Fibreboard was in a highly unusual situation compared to other asbestos defendants. It was a small company, valued by the market -- in light of its potential asbestos liabilities -- at $10 to $15 million. Tr. at 911-13; Fibreboard Exhs. 700, 701. It did not have enough cash to pay all or any substantial part of the asbestos injury claims asserted against it, but it had potentially very valuable insurance assets in the form of the disputed Continental and Pacific policies. Tr. at 169-70.

60. Faced with this situation, in September 1988 Fibreboard embarked upon a novel method of settling asbestos cases called the "Structured Settlement Program, " or "SSP." Under the SSP, Fibreboard agreed to make payments on

a deferred basis, that is, payment would be made when the insurance coverage dispute with Continental and Pacific was resolved. Fibreboard approached members of the asbestos plaintiffs' bar, revealed the facts about its corporate worth and its insurance situation, and asked for what in a sense was credit, or a "bridge" loan, to keep the company viable until the Coverage Case was finally resolved. As originally conceived, the SSP called for no cash payable at the time a settlement agreement was reached. Tr. at 170-71, 958.

61. However, the members of the plaintiffs' bar refused to accept the SSP as originally offered, insisting that they receive both cash and assurances that Fibreboard would not engage in asset-hiding tactics or other so-called "scorched-earth" ligation tactics. Tr. at 171-72. The attorneys whom other members of the asbestos plaintiffs' bar consulted on SSP-related matters were principally Steven Kazan and Harry Wartnick. Messrs. Kazan and Wartnick negotiated a revised program with Fibreboard by which 40% cash was payable for what came to be called "pre-1959" exposure cases, i.e., those cases in which the claimant was first exposed to asbestos before the end of the Continental policy period (March 15, 1959), and thus for which Fibreboard alleged it had coverage under the Continental and/or Pacific policies.[13] The deferred payments were due September 1, 1993, which deadline could be extended, if the Coverage Case was not by then resolved to September 1, 1996. The SSP contracts provided that Fibreboard would not make any excessive dividend distributions, or undertake

[13]Conversely, those cases or claims arising out of first exposure to asbestos after March 15, 1959, are commonly known as "post-1959" cases or claims.

corporate reorganizations that could siphon off corporate assets beyond the reach of asbestos claimants. Fibreboard Exh. 901; Tr. at 169-73.

62. Fibreboard's strategy was simple. It asked that claimants defer collection of agreed-upon settlement amounts until the Coverage Case was resolved. In return, it undertook to conserve corporate assets as the Coverage Case made its way through the appellate process. If Fibreboard won the Coverage Case, those plaintiffs who accepted SSP settlements would be paid from insurance proceeds. If Fibreboard lost the Coverage Case, all of the company's assets would be turned over to the plaintiffs. Tr. at 170-74.

63. The revised SSP was offered on a standard basis nationwide, and was accepted generally by plaintiffs' counsel. However, plaintiffs demanded increased settlement values reflecting the fact that the SSP vehicle presented a risk that they would never collect the deferred portion of the payment if Fibreboard lost the Coverage Case. Tr. at 176-77.

64. Fibreboard's strategy of deferring payment of settlements until resolution of its insurance disputes, and committing to keep corporate assets intact and available to claimants were the Coverage Case to be lost, differed from that taken by other asbestos defendants. Manville, which had the largest share of liability of any defendant (30% to 33%), entered bankruptcy while still an otherwise financially healthy company. Other asbestos defendants, such as Raymark and Celotex, spent considerable corporate resources defending cases as their corporate resources (including insurance) dwindled. These

defendants adopted so-called "matrix" settlement systems, offering fixed, low-value settlement amounts for specific diseases, then reorganizing their corporate structures in such a way that remaining assets would not be available to claimants, and then entering bankruptcy. These "scorched-earth" litigation tactics generated substantial trial activity. Fitzpatrick Tr. at 79-81; Tr. at 151-54; Fibreboard Exh. 101 at 12, 48.

B. The Fibreboard-Continental "Interim Agreement"

65. In December 1988, Fibreboard and Continental entered into what became known as the "Interim Agreement." Fibreboard Exh. 900. The Interim Agreement included the following basic provisions:

-- Fibreboard released Continental from claims for bad faith damages that were scheduled to be tried in the Coverage Case. -- Continental agreed to fund the 40% cash component of the SSP settlements, after Fibreboard first exhausted the monies it had available from the AIG and Home Insurance Company settlements.

-- If Fibreboard prevailed in the Coverage Case, Continental would repay or credit the AIG and Home Insurance Company monies Fibreboard had spent, in order that the credit amounts would be available to pay uninsured cases i.e., post-1959 cases. By the same token, if Fibreboard lost the Coverage Case, Fibreboard

would reimburse Continental for monies Continental had paid for Fibreboard's defense and indemnity under the Interim Agreement.

-- Continental agreed to fund Fibreboard's defense up to annual limits, or "caps," of $25 million to $29 million per year.

-- Continental and Fibreboard agreed to cooperate in the joint investigation, evaluation, management, defense, and disposition of pre-1959 claims.

-- The Interim Agreement was to expire upon the earlier of the end of 1992, or finality of the appeal of the Coverage Case. Tr. at 174-75; Fibreboard Exh. 900.

66. The SSP did not solve Fibreboard's settlement problems. As other defendants were taken to trial, plaintiffs also often would take Fibreboard to trial rather than attempting to resolve credit or set-off problems created by the SSP. Tr. at 180-82. The SSP was not adequate to dispose of large groups of cases that were consolidated for trial. the result was that Fibreboard became a defendant in trials of large consolidated cases, including the Cimino case in this Court, the Denver Turley case in West Virginia, the Baltimore consolidated cases, and the Brooklyn Navy Shipyard cases. These circumstances generated substantial defense expenditures by Fibreboard. Tr. at 180-82; Fibreboard Exhs. 104, 105, 107-117, 120-124.

67. Fibreboard's efforts to adjust to the post-ACF litigation setting were very costly. Fibreboard's defense costs from September 1988 through 1989 were $50 million, almost twice the total face value of settlements negotiated during that period. In 1990, Fibreboard's defense costs were $52 million, as compared to $45 million of nominal value in negotiated settlements. Fibreboard Exh. 919, Tab 3; Tr. 230-31, 432-33.

68. By June 1990, the annual defense "cap" for all of 1990 under the Interim Agreement had been reached, and Continental therefore declined to pay for defense costs incurred thereafter in 1990. Fibreboard Exhs. 402, 405; Tr. at 181-82.

C. Fibreboard-Pacific Negotiations and the Fibreboard-Pacific Agreements

69. In the course of negotiations to have the defense caps lifted, Fibreboard proposed in late 1990 to Continental and Pacific that the parties negotiate complete settlements of the policies. Continental declined the proposal. Pacific and Fibreboard pursued such negotiations. Tr. at 184-85.

70. Fibreboard was interested in pursuing separate negotiations with Pacific because Fibreboard had no coverage for post-1959 claims. The Coverage Case judgment required each policy to respond to a claim as to which first exposure to asbestos occurred before the expiration date of the policy. Because the Continental policy followed the Pacific policy, under the judgment any claim covered by the Pacific

policy was also covered by the Continental policy. Fibreboard Exh. 223; Tr. at 184-87.

71. Beginning in 1990 and continuing into 1992, separate negotiations between Fibreboard and Pacific produced two separate agreements. On March 1, 1991, Pacific and Fibreboard entered into a written settlement entitled "Settlement Agreement." Fibreboard Exh. 902 (referred to as the "Pacific I Agreement"). The Pacific I Agreement provided that the parties would apply jointly to the California Court of Appeal to seek reversal of that part of the Coverage Case judgment that pertained to the Phase I jury verdict against Pacific (determining the existence and terms of the Pacific policy). The agreement provided that the settlement would become effective on the date the Court of Appeal's order reversing the judgment with respect to the Phase I verdict became final. The effect of such a reversal was intended to be the elimination of any further liability of Pacific under its policy. The Pacific I Agreement provided for payments by Pacific for Fibreboard's benefit totalling $142 million, of which $107 million was payable to a trust, for use exclusively to pay post-1959 asbestos injury claims, or, if not so needed, for asbestos property damage claims. Tr. at 186-88.

72. On March 5, 1991, a different division of the Court of Appeal from that in which the Coverage Case was pending issued an opinion in Neary v. Regents of the University of California, 278 Cal. Rptr. 773 (1991), rev'd, 834 P.2d 119 (Cal. 1992). The Court in Neary refused to reverse a trial court judgment on stipulation of the parties, where reversal was a condition to settlement. Tr. at 188; Fibreboard Exh. 903.

73. On April 19, 1991, Fibreboard and Pacific filed a motion for stipulated reversal of the judgment. The Court of Appeal denied the motion on October 3, 1991. Fibreboard Exh. 904. Thereafter, the time limit for achieving the stipulated reversal expired and the Pacific I Agreement did not become effective. Tr. at 188-91.

74. On March 27, 1992, Pacific and Fibreboard entered into a second agreement. Fibreboard Exh. 905 (referred to as the "Pacific II Agreement"). Under the Pacific II Agreement, Pacific paid Fibreboard $9 million in the form of a loan, together with $1 million under a separate agreement providing for a rescission of the Pacific policy. Pacific also agreed to provide interim funding for defense and indemnity in excess of that provided by Continental, not to exceed $20 million. In addition, Pacific agreed to pay further sums to Fibreboard at the conclusion of the Coverage Case, but only if Fibreboard prevailed on the Phase III issues of trigger and scope. If so, and depending on the decision as to Phase I issues (the existence and terms of the Pacific policy), Pacific agreed to pay $105 million (if Fibreboard won on Phase I) or $80 million (if Fibreboard did not win). In addition, if Fibreboard obtained a "Final 5.2 Order,"[14] Pacific agreed to pay an additional $225 million (if Fibreboard won Phase I), or $140 million (if Fibreboard did not win). Thus, the Pacific II Agreement called for a maximum payment to Fibreboard of

[14]A "Final 5.2 Order" (so-called on account of the paragraph number in the agreement that defined the term) was a final order determining that Continental would have no rights against Pacific for any asbestos-related defense or indemnity costs that Continental had, before the date of the Pacific II Agreement, neither agreed to pay (issuing a policy without more was not such an agreement) nor actually paid.

$360 million, of which $225 million depended on Fibreboard obtaining a "Final 5.2 Order." As was the case with Pacific I, these payments, other than interim funds, were to be paid into trust to pay post-1959 asbestos injury claims, with any surplus payable for asbestos property damage claims. Fibreboard Exh. 905. The Pacific II Agreement called for, and the parties executed, a rescission of all Pacific policies that might cover Fibreboard's asbestos claims. Fibreboard Exh. 906; Tr. at 188-91.

D. The Fibreboard Assignment Settlement Program and Related Litigation

75. In early 1991, Fibreboard believed it faced extreme circumstances that caused it to initiate a new settlement program. Tr. at 182. Confronted with the inability to settle large groups of cases through the SSP, Fibreboard faced major consolidated trials in Texas, Mississippi and Baltimore. Together with the exhaustion of defense monies under the Interim Agreement "caps," this led Fibreboard to initiate the assignment settlement program. Tr. at 182. Unlike the SSP, the terms of each assignment settlement were separately negotiated, and were not identical. Their basic structures were all very similar, however. In settlement of pre-1959 exposure cases, Fibreboard paid the claimants no cash at the time the settlement agreement was made, but rather granted an assignment of rights to proceeds under the Continental policy, together with any bad faith claims for Continental's failure to pay the assigned amount. If Fibreboard lost the Coverage Case, it was responsible to pay the entire settlement amounts. In post-1959 cases, claimants were given an SSP promise to pay. Tr. at 191-93; Continental Exh. 14. Plaintiffs who entered into assignment settlements

demanded that Fibreboard obtain a judicial confirmation of Fibreboard's right to make the assignments. Tr. at 196.

76. Assignment settlements typically covered a law firm's entire caseload, but with provisions that addressed the possibility that certain claimants might reject the negotiated settlement. As it had done in the SSP settlements, under the assignment settlement program Fibreboard agreed to preserve its net worth and corporate resources, so that if it did lose the Coverage Case it could be liquidated for the benefit of asbestos claimants. Tr. at 193, 212-13; Continental Exh. 14.

77. Under the assignment settlement program, as was the case with the SSP before, nominal settlement values tended to increase again because, among other reasons (i) plaintiffs had to accept the increased risk that they would never be paid if Fibreboard lost the Coverage Case (they were receiving no cash, whereas under the SSP they had received 40% in cash); (ii) the assignments were of questionable validity under California law; and (iii) Continental now took the position that the assignment settlement program vitiated insurance coverage even if Fibreboard were to win the Coverage Case. Tr. at 195-96. The average settlement amount under the SSP held steady at roughly $5,400 per case; on the other hand, the assignment settlement average overall more than doubled, rising to over $11,400 per case. Tr. at 195-201; Fibreboard Exh. 919, Tabs 18-21. The weight of the assignment settlement program served to put pressure on Continental to engage in global settlement negotiations. Tr. at 608-09, 1082-84, 1177-78, 1325-28.

78. Continental strongly objected to the assignment settlements and office-wide settlements on several grounds, including that Fibreboard had no right to enter into them, that they breached the Interim Agreement provisions calling for joint management of the cases and claim-by-claim evaluation of cases, and that they violated policy provisions prohibiting assignments of policy rights and settlements without Continental's consent. Continental also objected to the assignment settlements on the grounds that the settlement amounts were inflated and that pre-1959 (insured) claims bore a disproportionately high share of gross settlement amounts in each office-wide settlement agreement. Tr. at 195-96.

79. A broad, bitter and costly conflict ensued be- tween Fibreboard and Continental over the assignment program, and related issues. This conflict persisted through 1991 and 1992, and led to an agreement entered into on April 9, 1993 between Fibreboard and Continental, which has become known as the "April 9 Agreement." Fibreboard Exh. 908; Tr. at 1340-47.

80. In the conflict over the assignment settlement program, Continental took the position that the December 1988 "Interim Agreement" had redefined its policy obligations for the interim period, and that, if it complied with the Interim Agreement, it had provided all the defense that it was obligated to provide. Fibreboard took the position that an obligation to provide a full defense under the insurance policy still existed, that if payments under the Interim Agreement for defense were not adequate then Continental had not complied with its policy defense obligations leaving Fibreboard free to enter into settlements without Continental's consent, and that

Fibreboard could do so by way of assignment of proceeds under the Continental policy. Tr. at 202-03.

81. Continental's objections began with the first assignment settlement, in the Cimino litigation. Continental Exh. 14; Fibreboard Exhs. 403, 500. Continental consistently objected to use of the assignment vehicle in all settlements, including the Brooklyn Navy Shipyard cases brought by the Levy, Phillips law firm (Fibreboard Exh. 407), the Weitz & Luxenberg cases (Fibreboard Exh. 409), and the Kazan cases (Fibreboard Exhs. 410, 411), among several others. Fibreboard Exhs. 406, 408, 416, 430, 431.

82. Continental asserted and continues to assert that the assignment settlement program not only violated various provisions of the Interim Agreement, but also the insurance policy itself, including provisions prohibiting assignment of interests under the policy, prohibiting settlements without Continental's consent, prohibiting action against Continental other than for declaratory relief, mandating cooperation, and prohibiting assumption of obligations. Fibreboard Exh. 412; Tr. at 202-04. Continental further asserted, and continues to assert, that Fibreboard's use of assignments had vitiated its coverage altogether, quite apart from the outcome of the Coverage Case. Tr. at 1515-17. Fibreboard adamantly rejected, and continues to disagree with, Continental's position in this regard, and asserts that Continental has no right to make any such claims. Tr. at 1545-46.

83. Several lawsuits were brought by Fibreboard against Continental to test whether Fibreboard

legally could enter into settlements using the assignment mechanism. The first action, known as Andrus v. Fibreboard Corp., was filed by Fibreboard on April 1, 1991 in state court in Alameda County, California, in connection with a proposed settlement of asbestos cases brought by Mr. Kazan's firm. Fibreboard Exhs. 303, 304.

84. On June 28, 1991, Continental filed an action in federal court in California, challenging the pending assignment settlement of the Cimino cases. Fibreboard Exhs. 305, 308. Eventually, that action was dismissed in favor of a third-party action filed in July 1991 by Fibreboard against Continental in Cimino seeking approval of the Cimino assignment settlement. Fibreboard Exhs. 306, 312, 313; Tr. at 206.

85. Fibreboard brought similar actions in federal court in New York to validate assignment settlements with claimants represented by the Levy, Phillips firm, and those represented by Weitz & Luxenberg. Fibreboard Exhs. 307, 311. Those matters were settled directly by Continental with claimants, immediately before trial or hearing, without a judicial determination as to the validity of the assignment vehicle, and, accordingly, Fibreboard's efforts to obtain an early ruling in its favor on the assignment issue did not succeed. Fibreboard Exhs. 310, 314; Tr. at 205-06.

86. Mr. Kazan did not settle the cases involved in the Andrus action directly with Continental. Fibreboard Exhs. 421, 422. On June 1, 1992, Judge Kawaichi of the Superior Court in Alameda County granted summary adjudication in Andrus in Fibreboard's favor, ruling that

Fibreboard had the right to make reasonable settlements by way of assignment. Fibreboard Exh. 315. Judge Kawaichi reaffirmed that order on July 6, 1992, on Continental's motion for reconsideration. Fibreboard Exh. 317. On September 2, 1992, the California Court of Appeal summarily rejected Continental's petition for writ of mandate, Fibreboard Exhs. 318, 321, and judgment in Andrus was entered in Fibreboard's favor in September 1992. Fibreboard Exh. 322; Tr. at 206-08.

87. On July 8, 1992, shortly after Judge Kawaichi reaffirmed the Andrus summary adjudication, Continental wrote Fibreboard stating that, notwithstanding the defense cap provisions in the Interim Agreement, Continental would provide a defense in accordance with applicable law. Fibreboard Exh. 435. Continental then reiterated its position that Fibreboard had no basis to make assignment settlements, given the position taken in the July 8 letter. Fibreboard Exh. 436. Fibreboard contended that Continental's offer to provide a full defense came too late. This new dispute provoked a series of correspondence, with each side arguing its contention, and with Fibreboard eventually taking the position in January 1993 that Continental could not remedy the situation created by its past failures to defend as long as Continental continued to reserve its coverage position. Fibreboard Exhs. 439-441, 446, 450, 452, 454, 468; Tr. at 234- 36.

88. The controversies between Continental and Fibreboard involved many areas in addition to Continental's objections to Fibreboard settling claims by way of assignments. Fibreboard contended that Continental refused to pay defense-related costs, such as those for a computerized case management system, a case processing center, and costs of

negotiating assignment settlements. Fibreboard Exhs. 419, 434. Continental argued that Fibreboard's method for allocating amounts to individual cases based on duration of exposure, date of first exposure, and disease (known as the "point system"), improperly weighted the settlement amounts in group or inventory settlements to pre-1959 cases. Fibreboard Exh. 410. Continental desired to attend settlement negotiations between Fibreboard's counsel and claimants' counsel; Fibreboard insisted on preconditions to such attendance. Fibreboard Exh. 413. When Continental developed its own settlement program, containing a 10% cash component, Fibreboard objected to that, Fibreboard Exhs. 437, 438, 442, 443, and to Continental's efforts to make settlement offers directly to claimants' counsel rather than through Fibreboard's counsel. Fibreboard Exhs. 415, 417. After Continental negotiated privately with counsel for the Cimino claimants, Fibreboard took the position that Continental had assumed full responsibility for all of those cases. Fibreboard Exh. 432. Continental's efforts to transform the settlement process into one in which it fully participated, by way of three-party agreements (that is, including Fibreboard, plaintiffs and Continental), led to contentions by Fibreboard that there was no agreed-upon three-party settlement structure, and Continental's assertion that there was. Fibreboard Exhs. 452, 457, 459, 460.

V. HISTORY OF GLOBAL SETTLEMENT NEGOTIATIONS

A. Early Global Negotiations (1990-1992)

89. A number of factors prompted Fibreboard to begin to explore the possibility of a global resolution of all of its asbestos injury liabilities in late 1990 and early 1991.

Fibreboard was locked in a significant dispute with Continental and did not have enough money to defend itself. As a result, it entered into the Pacific I Agreement -- and, later, the Pacific II Agreement -- to obtain funds. Tr. at 208-09. It then commenced the assignment settlement program in order to try to bring the underlying litigation closer to Continental, believing that it was important that Continental feel as threatened as Fibreboard did before Fibreboard would be able to receive some protection from Continental. Fibreboard wanted, in short, to get Continental interested in Fibreboard's entire asbestos problem. Fibreboard believed that in order to bring Continental to the bargaining table with respect to resolving all of Fibreboard's asbestos injury liabilities (pre-1959 and post-1959 claims), it was necessary to demonstrate progress toward assignment-based global settlement negotiations with the plaintiffs. Tr. at 209,633.

90. Other developments contributed to Fibreboard's interest in seeking a global resolution. Fibreboard was particularly motivated by the Linscomb action, filed in this Court in July of 1990 as a Rule 23(b)(1)(B) present and future claims class action, which had been widely discussed as a vehicle for "limited fund" treatment of certain defendants, including Fibreboard. Tr. at 210; Fitzpatrick Tr. at 86-87; Class Plaintiffs Exh. 1002; Fibreboard Exh. 117. At the 1990 Federal Judicial Center meeting at the Dolley Madison House in Washington, D.C., the message taken away by Fibreboard was that litigants should devise a solution to the asbestos problem, or the courts would impose a solution the litigants might not like. Tr. at 211; Fitzpatrick Tr. at 83-84. In September 1990, the Asbestos Ad Hoc Committee had been commissioned to report on the asbestos problem in the courts. In November

1990, eight federal judges had written a letter to the MDL Panel requesting transfer under 28 U.S.C. ¶1407 of federal asbestos cases to Judge Weiner. Fibreboard Exh. 118. All of these developments stimulated Fibreboard's interest in global settlement discussions. Tr. at 208-11.

91. Fibreboard initially approached Mr. Motley of the Ness Motley firm to discuss a global settlement because he had been outspoken about the need for alternative approaches at the Dolley Madison House meeting, because asbestos lawyers generally advised that Ness Motley involvement would be necessary for any global settlement, and because Ness Motley was involved in virtually all major trials against Fibreboard. Tr. at 211-12. Mr. Motley -- together with his partner at Ness Motley, Joseph F. Rice -- eventually agreed to consider a global settlement on an assignment basis. As proposed by Fibreboard, such a settlement would have the following elemental structure: if Fibreboard confirmed its coverage through a victory in the Coverage Case, plaintiffs would look only to Fibreboard's insurance assets for compensation, and not to Fibreboard's other (non-insurance) assets; if Fibreboard lost its coverage as the result of a loss in the Coverage Case, in contrast, plaintiffs could "have the company." Tr. at 212-13.

92. Fibreboard also approached Messrs. Kazan and Wartnick in late 1990 or in early 1991 suggesting that they consider a global settlement. Kazan and Wartnick were logical choices because they had the most information about Fibreboard's West Coast activity, and other asbestos plaintiffs' lawyers looked to them for guidance in the Fibreboard litigation. Fibreboard felt that negotiations would have

credibility only if they, as experts on Fibreboard, were involved. Tr. at 213-14. Messrs. Kazan and Wartnick contacted Mr. Motley in the belief that Ness Motley would have to be involved if any global settlement was to succeed. Tr. at 644-45.

93. Having decided to go forward with negotiations with Fibreboard with respect to an assignment-based global settlement of present and future claims, the Ness Motley lawyers and Messrs. Kazan and Wartnick ("Plaintiffs' Counsel")[15] took several steps to increase their negotiating effectiveness. They retained the law firm of Caplin & Drysdale, Chartered, to represent them and assist them in handling certain highly complex tax, insurance, class action and commercial litigation issues that might arise in the negotiations and that they believed might be beyond their areas of personal expertise. Tr. at 646, 1555-56. The primary lawyers at Caplin & Drysdale involved in this representation were Elihu Inselbuch and Peter Van N. Lockwood. Either Mr. Inselbuch or Mr. Lockwood or both were present at most of the discussions and negotiations described herein. Fibreboard Exhs. 505, 511; Tr. at 1382, 1450, 1466, 1550-51, 1555. Although Caplin & Drysdale at no time represented individual asbestos plaintiffs, that firm had had extensive experience in the asbestos field, including work in connection with the Manville bankruptcy and trust. Tr. at 1556. This Court finds that it was prudent and reasonable for Plaintiffs' Counsel to have retained them.

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[15] Another Ness Motley partner, Joseph B. Cox, Jr., became involved in these negotiations in May 1992. Tr. at 1074-75. From that point on, the term "Plaintiffs' Counsel" as used herein refers to Messrs. Rice, Cox, Kazan and Wartnick.

94. At the request of Plaintiffs' Counsel, Fibreboard supplied them with information about its past claims experiences, historical settlement averages, and financial information, on a confidential basis. Tr. at 215-16, 648; Fibreboard Exhs. 501-15.

95. In negotiating a potential global settlement, Plaintiffs' Counsel also drew upon a substantial body of knowledge about Fibreboard that had been collected by them and by other plaintiffs' counsel. During the many years or asbestos-related litigation involving Fibreboard, various plaintiffs' counsel had conducted massive discovery of Fibreboard, including document discovery and depositions of Fibreboard's corporate officers and knowledgeable employees. These counsel had exhaustively examined the evidence bearing upon Fibreboard's involvement with asbestos and its knowledge of the hazards of asbestos, including sales records and other information. Tr. at 937-38. This Court finds that Plaintiffs' Counsel's extensive knowledge of Fibreboard and its operations was more than sufficient to permit them to negotiate effectively.

96. In 1991, Plaintiffs' Counsel retained James Sinclair, an investment banker, to provide an estimated value of Fibreboard absent its asbestos-related liabilities. Tr. at 648. Mr. Sinclair conducted an analysis and estimated such value of Fibreboard to be between $230 million and $240 million. Ortiz Exh. 1.

97. Plaintiffs' Counsel also retained Dr. William Nicholson, a prominent and distinguished epidemiologist at Mount Sinai Hospital in New York, to provide them with a projection of the number of future asbestos-related

claims against Fibreboard. Tr. at 216, 648, 836-39, 849. Dr. Nicholson is the author (together with Drs. Selikoff and Perkel) of a 1982 study entitled "Occupational Exposure to Asbestos: Population at Risk and Projected Mortality, 1980- 2030," which estimated the population that had been exposed to asbestos (of all manufacturers) in the past, and the number of resulting cancer cases from 1980 onward. Tr. at 839-49; Class Plaintiffs Exh. 1011. Dr. Nicholson's work in the field of future asbestos claims projections has been among the most accurate work done to date. Tr. at 648-49.

98. At the request of Plaintiffs' Counsel, Dr. Nicholson was provided with data from Fibreboard concerning number of claims against Fibreboard per year by industry; time of claimant's first employment; duration of claimant's employment; age of claimant; and type of claimant's disease. To the extent that gaps were found to exist in this database, Dr. Nicholson sought to fill those gaps with information gathered in connection with the Manville proceedings. Tr. at 216, 850- 51. Using this data, together with the results of this 1982 study, Dr. Nicholson made an estimate of the number of future claims against Fibreboard. The estimate, taking into account the uncertainty acknowledged by Dr. Nicholson, provided a range of just over 120,000 claims to just under 190,000 claims for the period beginning in September 1993 and continuing through 2029. Tr. at 851-58; Class Plaintiffs Exhs. 1010, 1012, 1018.

99. Dr. Nicholson's work was done in 1991. However, he reexamined his work during 1993 when projections by others were published in connection with the Manville trust litigation, and he reaffirmed the validity of his analyses and conclusions in August 1993. Tr. at 861-65. As

Dr. Nicholson explained, mesothelioma projections among those exposed to Fibreboard asbestos logically peaked earlier in time and fell off faster than projections for persons exposed to Manville products because of the different asbestos exposure patterns created by the different products of the two entities. Exposure to Fibreboard products was more common in shipyards during World War II, Tr. at 861-63, whereas Manville products were more broadly used over a wider period of time. It is thus inappropriate to compare Manville claims projections with Fibreboard claims projections. Tr. at 863.

100. Based on Dr. Nicholson's methodology, the his- torical accuracy of his work in the field of future asbestos claims projections, and his exemplary reputation in his field, the Court finds that it was prudent for Plaintiffs' Counsel to have retained Dr. Nicholson, and reasonable for them to have relied on his projections in their subsequent global settlement negotiations.

101. In 1990 and 1991, some of Plaintiffs' Counsel (together with other lawyers acting for asbestos claimants) had engaged in global negotiations with representatives of many asbestos defendants under the aegis of the Linscomb global class action pending in this Court. Fitzpatrick Tr. at 87-89. While those global negotiations never reached closure, a consensus among members of the plaintiffs' bar developed about overall average settlement values for each asbestos-related disease and the respective settlement shares of the various asbestos defendants. This consensus was taken into consideration by Plaintiffs' Counsel in their negotiations with Fibreboard. Tr. at 650-51, 1129-36.

102. Based upon their own broad experience, which included the SSP and assignment settlement program negotiations, the Linscomb negotiations, and the estimates from Mr. Sinclair and Dr. Nicholson, Plaintiffs' Counsel formulated a negotiating position with respect to an assignment-based global settlement. To do so, Plaintiffs' Counsel needed to estimate the number of future asbestos claims against Fibreboard, the value of those claims, as well as the proportion of claims representing pre-1959 and post-1959 exposures. The work that had been done in connection with the Linscomb action provided appropriate national average settlement values for various diseases. And Fibreboard's share from time to time of the national averages could be derived from ACF data and knowledge of the asbestos litigation. This information provided a reasonable basis for Plaintiffs' Counsel to use in global negotiations. Tr. at 650-52.

103. Prior to and during global negotiations, Plaintiffs' Counsel kept themselves informed of developments in the Coverage Case by obtaining and reviewing, inter alia, copies of the trial court's tentative decisions, the trial court's judgment, and the briefs submitted to the California Court of Appeal. Tr. at 643-44; Fibreboard Exh. 500.

104. In addition, later in the negotiating process the Ness Motley lawyers retained and consulted with Professor Samuel Dash with respect to ethical issues. Tr. at 1551-53.

105. This Court finds that Plaintiffs' Counsel correctly identified those areas in which outside assistance would help them to negotiate a global settlement more effectively on behalf of asbestos claimants, and that they took appropriate steps to obtain such outside assistance. In addition, this Court finds that Plaintiffs' Counsel took the necessary and proper steps to inform themselves of the pertinent facts and law so as to be able to formulate an effective negotiating position and to carry out their professional responsibilities in accord with the ethical standards governing attorneys. Tr. at 412-13.

106. Fibreboard asked that Plaintiffs' Counsel keep their colleagues in the plaintiffs' bar informed about global settlement discussions, and reiterated that Fibreboard would not pay any non-insurance resources in settlement if it prevailed in the Coverage Case. Tr. at 215.

107. Continental was informed early in the global negotiation process, and objected to a global settlement by way of assignment, as it had objected to any settlements by way of assignments. Tr. at 216-17.

108. Because Continental was not at the table, Plaintiffs' Counsel developed the strategy of first establishing a ration between the present value of the total settlement amounts for pre-1959 (insured) and post-1959 (uninsured) claims. To do so they separately calculated the data for different periods of exposure, types of exposure, and settlement shares, so that it could be matched with Dr. Nicholson's projections respecting the number and types of future cases anticipated to be filed against Fibreboard. They then took the position that they would first negotiate only the post-1959 settlement price with Fibreboard, and that they then would use their predetermined ratio to derive the settlement price for the pre-1959 claims to

avoid any argument by Continental that Fibreboard had, in effect made Continental (which would have responsibility for insured claims) pay for uninsured claims, which were Fibreboard's responsibility. Fibreboard would retain liability for all amounts if the Coverage Case failed. Tr. at 217-18, 650-53.

109. The 1991-1992 global negotiations were conducted with respect to all present and future asbestos-related personal injury cases against Fibreboard. The parties negoiated in contemplation of a Rule 23(b)(3) opt-out class action structure. Given a choice, Plaintiffs' Counsel preferred an opt-out settlement class structure, and felt it would be easier to support legally. Plaintiffs' Counsel rejected Fibreboard's suggestions for total or partial mandatory class treatment (of e.g. punitive damages claims). Tr. at 218, 649.

110. Negotiations progressed to the point where the parties apparently had reached agreement on price terms of $278 million for the post-1959 cases, and $1.86 billion for the pre-1959 cases. These prices would have covered both present and future cases. The parties exchanged draft term sheets in November 1991. Fibreboard Exhs. 528-530. Fibreboard intended to pay the post-1959 settlement price with money to be derived from the Pacific I Agreement, together with credits to be received from Continental under the Interim Agreement, from some remaining AIG and Home Insurance Company settlement monies, and from recovery of unpaid defense costs from Continental. Tr. at 219-20.

111. Difficulties arose, however, in resolving questions about opt-outs and contribution and indemnity issues, Tr. at 226-28, and Plaintiffs' Counsel eventually took the

position in December 1991 that negotiations were terminated. Fibreboard Exhs. 531, 532; Tr. at 228-30. Further attempts in 1992 to reach agreement on the terms of a global settlement were unavailing, with issues as to how to handle opt-outs and contribution and indemnity claims continuing to present major difficulties. Tr. at 230; Fibreboard Exhs. 533-536, 543-545.

112. Continental was kept informed of the global negotiations, and stated its objections to Fibreboard's assignment-based global settlement negotiations. Tr. at 216-17; Fibreboard Exhs. 404, 423. Continental expressed its desire to negotiate directly with representatives of the claimants, Fibreboard Exhs. 516, 518; Tr. at 223, and attempted to participate in negotiations, but Plaintiffs' Counsel insisted on negotiating with Fibreboard so long as there was a coverage dispute. Fibreboard Exh. 519. Continental sought inclusion in the global negotiations, suggesting the possibility of a resolution subject to the final decision in the Coverage Case. Fibreboard Exhs. 522, 523.

113. In March 1992, Continental suggested a $1.5 billion settlement limited to pre-1959 claims (present and future), to be paid $100 million a year over 15 years. Other than $20 million payable yearly during the remainder of the Coverage Case, the Continental offer was subject to the outcome of that litigation. Fibreboard Exh. 539. Fibreboard objected to what it asserted was an improper attempt by Continental to address only part of the company's asbestos litigation problem, Fibreboard Exh. 541, and there were no substantial discussions of the proposal. Tr. at 228-29.

114. There had also been efforts in April and May 1992, initiated by Fibreboard, to find a way, satisfactory to both Fibreboard and Continental, to proceed with global negotiations with Plaintiffs' Counsel. Proposals included Continental paying Fibreboard an amount of money to take responsibility for the entire asbestos problem, or Fibreboard turning over to Continental all its insurance, with Continental to assume responsibility for the entire problem. Fibreboard Exh. 424. These efforts were unavailing. Fibreboard Exhs. 425, 428, 429.

B. The Initial Ness Motley Agreement

115. In May 1992, when global negotiations had stalled, Fibreboard expressed an interest in settling all of the Ness Motley firm's asbestos cases. Tr. at 301, 1075. Mr. Snyder approached Messrs. Rice and Cox, who entered into negotiations for Ness Motley clients and on behalf of Ness Motley affiliate law firms across the country. The cases involved presented the broad range of asbestos-related diseases. Tr. at 301-03, 1076-78. These negotiations continued through the remainder of 1992. Tr. at 1076-84.

116. An agreement, now known as the "Initial Ness Motley Agreement," was signed December 30, 1992. Fibreboard Exh. 917. It covered 20,000 cases, at an average price of $13,000 per case, with provisions for adding more cases. It incorporated the point system, and was based on an assignment of rights under the Continental policy with respect to pre-1959 claims. Post-1959 claims were to be paid with monies derived from the Pacific II Agreement, and thus the Initial Ness Motley Agreement contained a provision requiring

Fibreboard to obtain a Final 5.2 Order. With the Initial Ness Motley Agreement, by January 1993 Fibreboard had settlement agreements in place involving debt to asbestos bodily injury claimants of over $1.2 billion, including $943 million in assignment settlements made in 1992. Tr. at 230-31.

C. Negotiations During 1993

1. Early 1993 To April 9, 1993

117. The Initial Ness Motley Agreement required that Fibreboard obtain Continental's assent to the assignment underlying it, or a court order approving that assignment. Thus, pursuant to the Initial Ness Motley Agreement, on January 11, 1993 Fibreboard filed suit in this Court against Continental, Fibreboard Corp. v. Continental Casualty Co., Civil Action No. 6:93cv11 (E.D.Tex.), seeking (i) a declaration that the assignment in the Initial Ness Motley Agreement by Fibreboard to the claimants of Fibreboard's rights under the Continental insurance policy was valid; (ii) a declaration that the amounts Fibreboard assigned pursuant to the Initial Ness Motley Agreement were fair and reasonable; and (iii) a bar order cutting off Continental's equitable contribution rights as against Pacific. Tr. at 232-33, 1327; Continental Exh. 22. Such a bar order was simultaneously sought by Fibreboard against Continental in state court in Alameda County, California. Continental Exh. 23.

118. In February 1993, Continental responded to this litigation by moving to dismiss or stay the action before this Court under the Declaratory Judgment Act (based on the pendency of the Alameda County action), and by moving to

dismiss under Fed. R. Civ. P. 12 for failure to join Pacific as a party. In the Alameda County action, Continental cross-complained against Fibreboard for a declaratory judgment that Fibreboard's assignment of rights under the Continental policy and its seeking a contribution bar order constituted breaches of the policy. Fibreboard thereafter responded, resisting the relief sought by Continental. Continental Exhs. 22, 23.

119. In early 1993, Continental made a corporate decision to determine whether it would be possible to achieve a global resolution of its entire Fibreboard asbestos-related liability. Tr. at 1330. In connection with this decision, on February 8, 1993, Continental's parent, CNA Financial Corporation, publicly announced that Continental would be seeking to discuss such a global settlement with Fibreboard, and that Continental was increasing its asbestos-related reserves by $1.5 billion. Tr. at 1330-31; Fibreboard Exh. 552. Fibreboard, in response, stated that it was "pleased that CNA has publicly acknowledged the order of magnitude of its potential liability arising from prior trial court judgments in Fibre- boards's favor. Fibreboard has been and remains ready to engage in good faith settlement negotiations with Continental." Continental Exh. 15.

120. At a status conference before this Court on March 10, 1993, at which representatives of Fibreboard, Con- tinental and Ness Motley were present, the Court and the par- ties discussed the possible appointment of a Settlement Facilitator. Tr. at 307-08, 1092-93.

121. On March 23, 1993, the Court appointed Judge Patrick E. Higginbotham of the United States Court of Appeals for the Fifth Circuit to act as Settlement Facilitator in

connection with the litigation pending in this Court between Fibreboard and Continental. Tr. at 1093, 1332; Fibreboard Exh. 559.

122. Judge Higginbotham, by letter dated March 25, 1993, asked the parties for letters setting forth the status of the matter and the parties' respective positions preparatory to a series of meetings before him. Fibreboard Exh. 560. Fibreboard and Continental responded with such letters. Fibreboard Exhs. 561, 562.

123. As set forth in its letter to Judge Higginbotham, Fibreboard stated its views that: (i) Fibreboard and Continental should focus their attention on resolving the issues raised in Fibreboard's pending litigation in this Court; (ii) Continental should agree to the terms of the Initial Ness Motley Agreement; (iii) to the extent that there were discrete aspects of Fibreboard's litigation in this Court on which agreement between Fibreboard and Continental could not be reached -- for example, Fibreboard's prayer for a contribution bar order -- then such disputed aspects should be adjudicated by the Court on an expedited basis; and (iv) Continental should not be permitted to become involved in negotiations between Fibreboard and Plaintiffs' Counsel toward a global resolution of all of Fibreboard's present and future asbestos personal injury liabilities -- negotiations that Fibreboard said were nearing a successful conclusion -- unless Fibreboard received assurances from Continental that Continental's participation in such negotiations would not cause delay, interference or prejudice to Fibreboard. Fibreboard Exh. 562.

124. Continental's understanding was that the focus of the settlement effort was intended to be an attempt to achieve a global settlement. Tr. at 1332-33. As set forth in Continental's letter to Judge Higginbotham, Continental believed that there were several major obstacles to a global settlement with Fibreboard, namely: (i) the Pacific II Agreement, whereby the parties to that agreement agreed to rescind the Pacific policy with the purported effect of extinguishing Continental's right to contribution from Pacific, in exchange for a payment by Pacific to Fibreboard of up to $360 million; (ii) Fibreboard's assignment settlement program, including the threat of a global resolution of Fibreboard's asbestos liabilities by means of an assignment settlement be- tween Fibreboard and Plaintiffs' Counsel without Continental's consent; (iii) obstructed communication between Continental and representatives of asbestos claimants, which Continental claimed prevented it from participating at the bargaining table; and (iv) alleged interference by Fibreboard with Continental's ability to acquire information regarding asbestos claimants asserting claims against Fibreboard. Tr. at 1333-34; Fibreboard Exh. 561.

125. Continental was also of the view in March 1993 that any global settlement with Fibreboard had to be structured as a non-opt-out class action settlement. This was a sine qua non for Continental, for several reasons. First, structuring the settlement on an opt-out basis could give the asbestos plaintiffs the equivalent of a "one-way option," in that if the Insurers were successful in the Coverage Case appeal there would likely be virtually no opt-outs from the settlement, whereas if Fibreboard were successful in the same appeal there might be a large number of opt-outs. Tr. at 1334-35. This analysis was predicated on an assessment that the likely time of

decision by the California Court of Appeal in the Coverage Case would be before any date where one could anticipate that a plaintiff class would be given the right to decide whether or not to opt out of the settlement. Tr. at 1335-36.

126. Second, Continental was not willing to contribute the major portion of a multi-billion dollar settlement and give up its right to continue litigating the Coverage Case appeal -- and thereby perhaps eliminate any liability to Fibreboard -- unless it could thereby achieve certainty with respect to the magnitude of its liabilities under the insurance policy it had issued to Fibreboard. Continental thus regularly insisted that any global settlement provide it with "total peace" with respect to asbestos-related liability. Continental did not believe that it could make an accurate assessment of the ultimate liability that would be associated with those class members who would choose to opt out of a future-claimants asbestos class action such as that being contemplated.[16] The contemplated class action differed in this regard from most class actions -- such as securities fraud class actions -- where the defendant can determine with reasonable accuracy at the outset the potential value of the opted-out claims. Tr. at 324, 1336-38, 1569-72.

127. For their part, Messrs. Rice and Cox were of the view that Fibreboard and Continental had to reach an agreement resolving the differences between them before Con- tinental should be permitted to participate in global settle-

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[16]While experts can assess -- although with uncertainty -- the value of a broad mix of future claims based on diseases that become manifest over a long period of time, there is little or no basis on which to predict which types of claims -- more serious than average, less serious than average, or simply average -- will be presented by those individuals who might choose to opt out.

ment negotiations with Plaintiffs' Counsel. Tr. at 1097-98. In an April 5, 1993 letter to Fibreboard's counsel, Mr. Cox stated two preconditions to Plaintiffs' Counsel's entering into global settlement negotiations. First, Mr. Cox was to be provided with a copoy of any written Fibreboard-Continental agreement that was reached, no later than April 9, 1993. And second, Continental was to advise Plaintiffs' Counsel that Continental had sufficient information to commence global negotiations. Mr. Cox further emphasized that, in his view, the original, primary focus of the negotiations before Judge Hig- ginbotham was with respect to a settlement of the Ness Motley cases. Fibreboard Exh. 563.

128. Fibreboard and Continental then engaged in extremely hard-fought, arm's-length, contentious negotiations that led to an agreement between them on April 9, 1993 (the "April 9 Agreement"). Tr. at 308-10, 1340, 1349; Fibreboard Exhs. 566, 908. Fibreboard believed that it had the right to enter into assignment settlements without Continental's consent. Plaintiffs' Counsel had agreed in principle to enter into a global settlement with Fibreboard funded by an assignment of rights against Continental and the proceeds of its settlement with Pacific. Fibreboard was thus unwilling to give up this position unless Continental agreed that it could only enter into a global settlement that would not require contribution of any of Fibreboard's non-insurance assets. Tr. at 309-12.

129. The April 9 Agreement provided, inter alia, that the parties would use their best efforts to achieve a global resolution of Fibreboard's asbestos liabilities, including the resolution of present cases and resolution of future asbestos

personal injury claims.[17] In addition, Continental agreed that it would not seek to reach a global settlement without Fibreboard's participation, and that any global settlement Continental did conclude with Fibreboard would be funded entirely within Fibreboard's available insurance resources. Tr. at 309-312, 1345-49; Fibreboard Exh. 908. Such a provision -- excluding Fibreboard's non-insurance assets from any global settlement -- had been Fibreboard's corporate goal for many years and continued to be a sine qua non for Fibreboard. Tr. at 144, 1349, 1588-89. Continental also agreed to pay the monies that Pacific had agreed to pay under the Pacific II Agreement under the same conditions and as if a Final 5.2 Order had been entered. This meant that if Continental were successful in voiding the Pacific II Agreement, Continental would nonetheless stand behind the monetary obligations of that agreement. Tr. at 310; Fibreboard Exh. 908 at ¶ 6(b).

130. The April 9 Agreement achieved several important purposes for Continental. First, it prevented Fibreboard from entering into any settlements -- including any further assignment settlements -- without Continental's consent. Second, Continental obtained direct access to global negotiations with Plaintiffs' Counsel. In addition, Continental obtained certain releases from Fibreboard, including a release with respect to asbestos property damage claims. Tr. at 1344; Fibreboard Exh. 908.

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[17]The April 9 Agreement expressly provided, however, that the "best efforts" clause in the agreement did not "obligate Continental to pay or obligate itself with respect to any particular amount or amounts of money or to agree to any particular term or terms in order to achieve" such a global resolution. Fibreboard Exh. 908 at 1, ¶ 1.

131. In the April 9 Agreement, Fibreboard obtained a number of important commitments from Continental: (i) most important, an undertaking -- which Fibreboard viewed as enforceable in court -- that Continental would use its best efforts to accomplish a settlement of all of Fibreboard's asbestos-related personal injury liabilities, pre-1959, post- 1959, settled, present, and future, within Fibreboard's remaining insurance resources; (ii) Continental's agreement to provide a full defense for pre-1959 cases and to pay indemnity and defense costs up to a specified limit ($95 million) for post-1959 cases; (iii) an undertaking by Continental to pay the monies Pacific had agreed to pay in Pacific II, as if a Final 5.2 Order had been entered; and (iv) a release of certain claims. Tr. at 309-12, 1344-49; Fibreboard Exh. 908.

132. Attempts by Continental during this period of time to enlist Pacific's agreement to participate in negotiations were unsuccessful. Pacific was of the view that it had entered into a binding agreement with Fibreboard that, upon entry of the court order being sought by Fibreboard in the action in this Court, would resolve its Fibreboard asbestos- related liability. Accordingly, Pacific rejected Judge Higginbotham's suggestion that it participate in global settlement negotiations. Tr. at 1349-50.

2. April 9, 1993 to August 9, 1993

133. In response to the Fibreboard suit seeking approval of the Initial Ness Motley Agreement, and once having reached the April 9 Agreement, on April 13, 1993 Continental commenced a separate suit in this Court against both Fibreboard and Pacific, seeking a declaration that Continental's rights to

equitable contribution against Pacific were unaffected by the Pacific II Agreement. Continental Casualty Co. v. Pacific Indemnity Co. and Fibreboard Corp., Civil Action No. 6:93cv 223 (E.D. Tex.). That suit was subsequently consolidated with Fibreboard's action relating to the Initial Ness Motley Agreement. Tr. at 1350; Fibreboard Exh. 329; Continental Exh.24.

134. On April 27, 1993, the California Court of Appeal notified the parties to the Coverage Case appeal that oral argument had been scheduled for June 11, 1993, with respect to a discrete group of appellate issues. The notice indicated that oral argument upon the Coverage Case appeal would be conducted in several "issue groups" (each dealing with a different group of appellate issues). The notice gave no indication, however, as to the schedule for completing the additional rounds of oral argument. Fibreboard Exh. 243. Indeed, the first notice was followed in short order by further notices from the Court of Appeal scheduling additional rounds of oral argument on the Coverage Case appeal. Continental Exh. 32; Fibreboard Exhs. 247, 248.

135. Having met the preconditions set forth in Mr. Cox's letter of April 5, Fibreboard Exh. 563, on April 29 and 30, 1993 discussions concerning a global settlement were held in Washington D.C. among Continental, Fibreboard, and Plaintiffs' Counsel. On the 29th, Herbert M. Wachtell, counsel for Continental, set forth Continental's negotiating positions, including its positions that any settlement must be on a mandatory non-opt-out basis, and that a prerequisite to any global settlement was an acceptable level of contribution from Pacific. Plaintiffs' Counsel rejected both of these positions, and

insisted that Continental put a concrete economic proposal on the table. Tr. at 314, 1099-1100, 1352, 1355.

136. On the morning of April 30th, Continental made a global settlement offer to Plaintiffs' Counsel to settle all of Fibreboard's present and future asbestos personal injury claims for $2 billion face amount, to be paid over 25 years. The offer continued to be conditioned upon the settlement being structured on a non-opt-out basis, as well as an adequate contribution from Pacific. Plaintiffs' Counsel briefly considered this offer among themselves and then returned to the negotiating room, stating that they believed that they had been presented with a "take-it-or-leave-it" offer, and that they would leave it. Plaintiffs' Counsel then walked out of the meeting. Tr. at 314-16, 1100, 1352-56.

137. For a period of time thereafter, Plaintiffs' Counsel took the position that the global settlement negotiations had terminated, that the only issue for discussion was the resolution of the Ness Motley litigation, and that Judge Higginbotham's role was limited to assisting in that resolu- tion. Continental and Fibreboard took the position that global negotiations were not over, and the Judge Higginbotham should encourage the parties to continue global negotiations. Tr. at 317-19, 1101-02, 1356-57, 1538; Fibreboard Exhs. 567, 572, 574-576.

138. Judge Higginbotham convened a meeting on May 5, 1993 in New Orleans attended by Fibreboard, Continental, Pa- cific and Messrs. Rice and Cox. At that meeting, Continental urged strongly that global negotiations be continued. Mr. Rice continued to insist that global negotiations

were over, as long as Continental continued to insist -- as it did at that meeting -- that any global settlement be done on a non-opt-out basis, and that there be an adequate financial contribution from Pacific. Pacific continued to state that the Pacific II Agreement resolved its Fibreboard asbestos- related liabilities. Nevertheless, Judge Higginbotham directed Continental and Messrs. Rice and Cox to set forth in writing their positions with respect to the structure of a global settlement (opt-out or non-opt-out) and the price of any such settlement. Continental and Messrs. Rice and Cox did so, in letters dated May 12, 1993 and May 17, 1993, respectively. Tr. at 1355-58, 1370, 1538; Fibreboard Exhs. 568, 574.

139. Judge Higginbotham convened another meeting in Washington, D.C., on May 17, 1993. Following their meeting with Judge Higginbotham, Continental, Fibreboard and Messrs. Rice and Cox met to discuss a resolution of the litigation concerning the Initial Ness Motley Agreement. Although Messrs. Rice and Cox took the position that formal global negotiations had ceased, and that they had no authority to negotiate on behalf of Messrs. Kazan and Wartnick, Continental and Fibreboard continued to seek to restart global negotiations, and Mr. Wachtell indicated that he would be willing to recommend to Continental a global price higher than that offered to Plaintiffs' Counsel on April 30. Tr. at 320, 1101-03, 1373-74. The global settlement being discussed continued to assume a settlement of both present and future claims. Tr. at 324-25, 1399-1400.

140. In late May 1993, during the course of nego- tiations concerning a settlement of the Ness Motley cases, informal meetings took place among Fibreboard, Continental

and Messrs. Rice and Cox in an effort to find a way to make progress on a global settlement. No avenue for progress was found. As a consequence, representatives of Continental and Fibreboard began discussions during June 1993 regarding the possibility of the two parties entering into a "bilateral" settlement of the insurance coverage dispute without the participation of Plaintiffs' Counsel. Several meetings were held between Continental and Fibreboard during June toward that end. By the end of June it was apparent that Fibreboard and Continental would not be able to reach such an agreement, with key issues such as price and Continental's demand of an acceptable contribution from Pacific unresolved. Tr. at 316- 17, 1375-79.

141. On June 15, 1993, representatives of Continental met with all of Plaintiffs' Counsel, including Messrs. Kazan and Wartnick, at the Caplin & Drysdale offices in Washington, D.C. Continental explained again why any global settlement would have to be structured as a non-opt-out deal that would provide Continental with certainty as to the cost of the deal at the outset. Plaintiffs' Counsel stated that they required a clearer indication of what Continental would be willing to pay in the early years of a settlement. Continental stated that it could be somewhat more flexible on price. Plaintiffs' Counsel conferred among themselves, and then -- having concluded that, for persuasive reasons, Continental simply would not proceed on an opt-out basis -- informed Continental that they would be willing to consider a Rule 23(b)(1)(B) global class action settlement if Continental could articulate the legal basis for such a structure, and on the understanding that the global settlement would cost Continental more if done on a non-opt-out basis. Plaintiffs' Counsel left Continental's representatives with a list of questions to which

they would require responses. Tr. at 392-93, 657-58, 1125-27, 1381-84, 1392-93, 1444-50, 1572; Class Plaintiffs Exh. 1015 at 1-2. Again the contemplation of the discussion was a global settlement of both present and future claims. Tr. at 324-25, 393, 1399-1400.

142. During June and July 1993, negotiations with respect to the Ness Motley cases continued among representa- tives of Continental, Fibreboard, and Ness Motley. Tr. at 1103-05. Mr. Rice insisted on a settlement price of $13,000 per pre-1959 claim. Tr. at 1394-95.

143. Notwithstanding the April 9 Agreement between Continental and Fibreboard, Fibreboard was still contractually obligated to procure a court order validating its right to enter into assignment settlements, and Continental faced the prospect that such an adjudication would require it to pay out on assignment agreements at case values it considered to be markedly inflated. Therefore, Continental desired to renegotiate these agreements as three-party deals, and Fibreboard and Continental created a national settlement program to do so. Tr. at 312-13, 1395-96.

144. Under that settlement program, representatives of Fibreboard and Continental met with various plaintiffs' counsel across the country with whom Fibreboard had entered into assignment settlements without Continental's consent, and jointly sought to convert the assignment settlements into "three-party" settlements to which Continental was a party. As part of the national program, Continental and Fibreboard also met with plaintiffs' counsel who had no assignment settlements in an effort to settle their cases as well.

Tr. at 1395-97. All such contemplated three-party settlements involved payment of part of the settlement in cash, with the balance contingent on either a settlement of the Coverage Case or a litigated loss of the Coverage Case by Continental. Tr. at 321, 1395-96, 1408-09. Ultimately, the renegotiated settlements reflected lower nominal values than the assignment agreements they replaced due to the cash component. Even so, the assignment program invariably resulted in renegotiated values that were still higher than Fibreboard's historical settlement averages. Tr. at 321-23, 522, 633, 931-32, 1082- 84, 1102-05.

145. During the course of this settlement program it became apparent that other plaintiffs' counsel were reluctant to enter into three-party settlements without an established standard for such a settlement, lest they find that they had entered into a less advantageous settlement for their clients. Accordingly, the conclusion of a three-party settlement of the Ness Motley cases came to be viewed as essential to concluding other three-party settlements because it could provide an acceptable benchmark. Tr. at 1396-97.

146. By early July the parties to the Ness Motley negotiations were close to agreement on price, as well as the size of the cash component. The balance would be contingent on either a settlement of the Coverage Case or a loss by Continental of the Coverage Case. Tr. at 1128, 1398.

147. On July 13, 1993, Messrs. Rice and Cox met in Dallas with Judge Higginbotham and representatives of Conti- nental and Fibreboard. At that meeting Judge Higginbotham offered his view that a global settlement covering

both present and future cases appeared too complex to negotiate. Tr. at 324-25, 1659-61. Accordingly, he suggested that any global settlement be limited to future cases, and that a settlement of the Ness Motley cases -- which could serve as the model for settling the presently pending Fibreboard cases -- should precede further global negotiations. Tr. at 1398- 1400.

148. In late July 1993 the parties to the Coverage Case appeal were informed by the California Court of Appeal that oral argument upon the final issue group of the appeal had been scheduled by that court for August 27, 1993. Tr. at 329, 1400-01; Fibreboard Exh. 248. The parties to the appeal (and, through them, Plaintiffs' Counsel) thus knew that the appeal would be finally submitted to the court for decision on that date. Indeed, the belief was held among at least some of the parties to the global negotiations that the court might issue its decision immediately following the conclusion of oral argument. Tr. at 329.[18]

149. The parties had agreed on July 13 that the appropriate way to proceed was to conclude the renegotiation of the Initial Ness Motley Agreement as a three-party agreement, and that this process had to take precedence over continued negotiation of a global settlement. Although Continental had been somewhat successful in slowing down the course of the Fibreboard v. Continental litigation in this Court, Messrs, Rice and Cox were actively seeking to have it proceed

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[18] In any event, provisions of the California State consti-tution made it highly likely that the California Court of Appeal would issue its decision within 90 days following the August 27 oral argument. Constitution of the State of California, Art. VI, § 19.

to trial promptly (as was Fibreboard, which was contractually bound to join them in that effort). Thus Continental faced the very real prospect the trial would go forward promptly if no three-party settlement of the Ness Motley cases were reached. However, Continental deemed it tactically very undesirable to challenge the Final 5.2 Order being sought by Fibreboard -- which order had been structured in the Initial Ness Motley Agreement to bar not only contribution claims with respect to Ness Motley cases but as to all asbestos claims -- in a context where such an order was a condition precedent to a settlement of over 20,000 asbestos cases. Tr. at 1386-87, 1400-06.

150. Moreover, Continental had decided that as long as Pacific had the prospect of obtaining approval of a bar order against Continental at a cost of only $330 million, there was no realistic possibility of bringing Pacific to the bargaining table to bear what Continental felt was Pacific's fair share of a global settlement. Accordingly, Continental concluded that the only way to reach a global settlement and avoid a very damaging loss in Fibreboard v. Continental was to negotiate first a new settlement of the Ness Motley cases. Tr. at 1350, 1385-87, 1400-07.

151. With the continued active assistance of Judge Higginbotham, and after hard-fought, arm's length negotiations, on August 5, 1993, Continental, Fibreboard and representatives of Ness Motley agreed to an amended Ness Motley Agreement (the "Substitute Ness Motley Agreement") settling substantially all of Ness Motley's presently pending claims. The Substitute Ness Motley Agreement resolved approximately 45,000 presently pending asbestos-related

personal injury claims against Fibreboard. Tr. at 321-23, 1128-29, 1402-04; Fibreboard Exh. 586.

152. The Substitute Ness Motley Agreement, compared to the Initial Ness Motley Agreement, reflected a reduction in the per-claimant settlement amounts, an increase in the number of cases settled, and the modification of numerous other pro- visions of the original agreement. The Substitute Ness Motley Agreement also provided for counsel participating in the agreement to recommend to their future asbestos clients an offer to settle their claims against Fibreboard on the same terms as those offered to settle present claims. The Substitute Ness Motley Agreement did not obligate any future claimants to accept those settlement terms and expressly provided for the full representation by Ness Motley of any person who rejected those settlement terms. In addition, Fibreboard and Continental were not required to offer those terms if more than a certain percentage of the Ness Motley future claimants elected to reject the terms. Tr. at 321-33, 1402; Fibreboard Exh. 909.

153. The Substitute Ness Motley Agreement, by its terms, was subject to approval by the Court as fair and reasonable, and such approval was sought from this Court on August 5, 1993. On August 9, 1993, after reviewing the agreement itself and conducting a hearing in which this Court considered reports from the parties, from Professor Samuel Dash, and from Judge Higginbotham, this Court gave that approval. Tr. at 1407, 1413; Fibreboard Exh. 588.

3. August 9, 1993 to August 27, 1993

154. After the conclusion of the Substitute Ness Motley Agreement, Judge Higginbotham addressed a letter to this Court stating that "I am persuaded that given the momentum of this successful negotiation, you should consider directing counsel to proceed [to explore a settlement of future claims]," and observing that "we could have no better set of parties and counsel to attempt its passage." Fibreboard Exh. 586.

155. By statement on the record on August 9, and a formal order of August 11, 1993, this Court appointed Plain- tiffs' Counsel to act as negotiating counsel on behalf of a class of future claimants who were exposed to Fibreboard asbestos-containing products and who may have contracted or might in the future contract an asbestos-related disease. Fibreboard Exhs. 588, 589. The negotiating parties did not in any way deem themselves to be bound in this respect and, indeed, in negotiations subsequent thereto active consideration was given to agreeing upon a combined global settlement of both present and future claims. Tr. at 325, 1426-27.

156. Although Messrs. Kazan and Wartnick were orally designated by this Court to participate in the global settlement negotiations under the condition that they first notify the Court that all of their existing claims against Fibreboard had been resolved, the Court's formal order contained no such condition. This appointment included, in addition to Plaintiffs' Counsel, Mr. Robert E. Sweeney, Esq. Tr. at 1407-12; Fibreboard Exhs. 588, 590.

157. Immediately upon the signing of the Substitute Ness Motley Agreement, Continental requested that Continental v. Pacific and Fibreboard be set for trial as soon as possible. Now that it could be separated from the issues that would have been involved in litigating the approval of the Initial Ness Motley Agreement, Continental was willing to have the issue of the validity of a Final 5.2 Order decided. Moreover, Continental wanted an immediate trial of its case so that Pacific would be motivated to join the negotiations before the California Court of Appeal rendered a decision in the Coverage Case. Fibreboard Exh. 588.

158. At the same time, this Court requested Judge Higginbotham to continue to serve as Settlement Facilitator (i) with respect to the pending Continental v. Pacific and Fibreboard litigation; and (ii) if Judge Higginbotham were agreeable, with respect to the negotiations for a global future claims-only settlement. Fibreboard Exh. 588.

159. Continental, Fibreboard and all of Plaintiffs' Counsel met later on the evening of August 9, 1993 at the Adolphus Hotel in Dallas, and intensive meetings continued through August 12, 1993. Although the parties present at those meetings did reach an agreement to use a negotiating benchmark of 186,000 future claims against Fibreboard, these meetings produced no price agreement because price negotiations were difficult, given Continental's position that any settlement would require an "acceptable" level of contribution from Pacific, and Plaintiffs' Counsel's unwillingness to enter into such a contingent settlement. The negotiations for a global settlement during those meetings were not limited to a future claims-only deal, but continued to

contemplate a global that would include all claims, both present and future. Indeed, the negotiations concluded with an offer by Plaintiffs' Counsel to price three different settlement alternatives: an all-inclusive global settlement, a settlement of unsettled present and all future claims, or a future claims-only global settlement. Tr. at 984, 1184-85, 1414-20.

160. During the Spring and Summer of 1993, at the same time that Plaintiff's Counsel were in intense discussions with Fibreboard and the Insurers, they and other representa- tives of asbestos victims were involved in resolving the fi- nancial difficulties facing the Manville trust. As part of the Manville negotiations, which involved dozens, if not hundreds, or lawyers across the country representing asbestos claimants as well as the Manville trust and other asbestos defendants, the participants developed what they considered to be fair values for the Manville settlement share of claims against that trust. The claims values thus developed for the Manville trust were congruent with the values developed by Plaintiffs' Counsel in Linscomb. Tr. at 1130-33.

161. The average settlement values for the Manville settlement share by disease developed in 1993 were as follows:

Mesothelioma	$200,000
Lung Cancer	$75,000
Other Cancers	$40,000
Asbestosis	$37,500
Pleural Disease	$12,000

Tr. at 1131.

162. In connection with the Linscomb and Manville negotiations, Plaintiffs' Counsel developed an understanding of the respective settlement shares of all asbestos defendants. Generally, Manville's share was 30% to 33%, while ACF members collectively bore responsibility for 80% to 85% of the remainder. Tr. at 1133. Plaintiffs' Counsel learned that Fibreboard, an ACF member, was responsible for approximately 12% of the ACF liabilities. Thus, by arithmetic, Plaintiffs' Counsel were able to isolate a settlement share range for Fibreboard as between 6% and 7% of the total (80% x 70% x 12%), and to apply that range to the average case settlement values by disease that they had developed. Tr. at 1133. That calculation produced the following Fibreboard settlement share ranges:

Disease	Total Liability		Fibreboard Share
Manville share	(30%)	(33%) (6%)	(7%)
Mesothelioma	600,000	660,000	36,000 to 46,200
Lung Cancer	225,000	247,500	13,500 to17,325
Other Cancer	120,000	132,000	7,200 to 9,240
ALD I	112,500	123,750	6,750 to 8,662
ALD II	36,000	39,600	2,160 to 2,772

Tr. at 1134-36.

163. During global negotiations in 1993 with Fibreboard and the Insurers, Plaintiffs' Counsel based their negotiating positions on the average settlement values developed in Linscomb and developing in Manville, and also compared them with values reflected in the Initial Ness Motley

Agreement and evolving in the negotiations of the Substitute Ness Motley Agreement. Tr. at 1129-33, 1157.

164. Based on the foregoing, the Court finds that it was reasonable from the standpoint of members of the Global Health Claimant Class for Plaintiffs' Counsel to use these settlement values in the global settlement negotiations during 1993.

165. On August 16 and 17, 1993, there was a meeting in Atlanta of the Ness Motley-affiliated law firms (as well as other attorneys) to discuss, among other things, the recently concluded Substitute Ness Motley Agreement and the status of the Fibreboard global negotiations. The meeting was attended by all of Plaintiffs' Counsel. Stephen Snyder (representing Fibreboard) and Meyer G. Koplow (representing Continental) attended to address the meeting on the Coverage Case. Informal discussions among the negotiators then present made it apparent that a solution to the Pacific issue needed to be found or a global agreement would not be reached. Tr. at 1452-53, 2448. Although the parties recognized that they should endeavor to reach a settlement by August 27, Continental's action against Fibreboard was not scheduled to commence until September 13, 1993. Tr. at 1420-21, 1458-60.

166. On August 18, 1993, Continental and Pacific representatives each met with Judge Higginbotham in Dallas. Continental was seeking to obtain an agreement from Pacific to share in the cost of a global settlement so that the issue of an acceptable level of contribution from Pacific could be removed as an obstacle to a deal. Pacific maintained its position

that it would not participate in global settlement negotiations. Tr. at 1422-23.

167. Having failed to bring Pacific to the negoti- ating table, Mr. Koplow met with Messrs. Rice and Cox on August 20, 1993 in Charleston to discuss a structure for a global settlement without up-front participation by Pacific, which would potentially leave Pacific with exposure to massive ongoing liability. Such an alternative structure would have entailed Continental in the first instance contributing more than its equitable share of a global settlement, with the hope of eventually recouping its overpayment. At the August 18 meeting with Judge Higginbotham, Continental had exposed its alternative structure to Judge Higginbotham to solicit his views and reactions. Although Messrs. Rice and Cox pressed for a Continental commitment to do such a deal, Mr. Koplow stated that he would require until the night of Sunday, August 22 -- when negotiations were set to resume in Philadelphia --either to bring Pacific to the table or to commit to proceed on a deal without Pacific. Tr. at 1421-22, 1424.

168. High-level discussions between Continental and Pacific thereupon took place over the weekend of August 21 and August 22, 1993 in New York. On Sunday, August 22, Continental and Pacific reached a memorandum agreement, subject to the approvals of their respective boards of directors (which subsequently were given), to resolve the dispute between them with respect to equitable contribution rights. (This agreement was subsequently superseded by an agreement between them dated October 12, 1993.) Tr. at 1422-25; Continental Exhs. 20, 21.

169. Pursuant to that agreement, Pacific agreed to share with Continental the costs of funding a global settlement of future asbestos-related personal injury claims against Fibreboard, on the basis of Continental paying approximately 65% of the total amounts that would be required, with Pacific being responsible for the remaining 35%. They also agreed to share the costs of satisfying liabilities on any existing asbestos-related personal injury claims, pursuant to a separate provision of that agreement. In the event no global settlement or other resolution of the insurance coverage dispute was reached or the requisite court approvals were not obtained, Continental and Pacific agreed that the parties would continue to contribute on the same shared basis toward satisfying Fibreboard's liabilities to asbestos personal injury claimants to the extent that either or both of them were finally determined in the Coverage Case to be responsible for such liabilities. Continental Exhs. 20, 21.

170. As scheduled, global negotiations resumed in Philadelphia at the Four Seasons Hotel on the evening of Sunday, August 22, 1993. Fibreboard, Continental and Plaintiffs' Counsel, as well as Mr. Sweeney, were present. Everyone was informed of the Continental-Pacific agreement and the negotiations proceeded. Tr. at 329-30, 409-10. Continental indicated that the Insurers' preference was to negotiate a global settlement of both present and future claims, and asked Plaintiffs' Counsel to price an all-inclusive global settlement. Although Plaintiffs' Counsel expressed a willingness to do so ten days earlier in Dallas, they now stated that they were unwilling to do any global deal that included present cases. The reason given was an inability to satisfy themselves as to the remaining Fibreboard exposure on unsettled present cases. The

quality and quantity of information that existed as of August 22, 1993, were not adequate for Plaintiffs' Counsel to be willing to price a global settlement including these claims.[19] Thus, the parties proceeded to focus solely on a future claims-only global settlement. An offer of $1.3 billion from Continental was rejected by Plaintiffs' Counsel. Tr. at 329-31, 1426-27, 1442-45, 1573-74.

171. Throughout the negotiations following the April 9 Agreement, Plaintiffs' Counsel had raised the issue of the value of Fibreboard's equity in any settlement where there would be no further recourse to Fibreboard or the Insurers. On the night of Monday, August 23, 1993, Continental increased the Insurers' offer by $200 million to $1.5 billion, and indicated that it would be their final offer. Continental viewed the $200 million amount of the increase as approximately equivalent to the maximum value of Fibreboard, and offered it to compensated for the fact that Fibreboard's non-insurance assets were not available due to the April 9 Agreement. The Insurers deemed that the $1.5 billion amount was an amount that would and should be acceptable to Plaintiffs' Counsel. Tr. at 1445-50. Indeed, the Insurers' counsel had no authorization from their clients to agree to a higher amount, and the Continental-Pacific agreement reached the previous Sunday had as its express premise that the amount needed to reach a global

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[19]Plaintiffs' Counsel's position in this regard is understandable. It is apparent from the testimony that neither Fibreboard nor Continental was in a position to fix with any degree of precision the number or source of unsettled present claims against Fibreboard. Tr. at 713-15, 719-20, 2677-79; Fibreboard Exh. 827. Any significant underestimation of present cases would have a much larger effect on a settlement fund than underestimates of claims that would appear over a period of years.

settlement was $1.5 billion. Tr. at 1444-47, 1462, 1471; Continental Exh. 20.

172. Even though Plaintiffs' Counsel had previously determined that they would settle if they could get $1.5 billion, Tr. at 1014-16, the Continental-Pacific offer was likewise rejected, with some of Plaintiffs' Counsel walking out of the meeting. Negotiations broke off. It was, however, agreed that one, final, last-ditch effort would be made to reach agreement before the submission of the Coverage Case appeal on Friday, August 27, 1993. The parties agreed to convene in Tyler, Texas in the early afternoon of Thursday, August 26, 1993, for one final negotiating effort, with Court assistance in the discussions. Tr. at 331-32, 1444-51. The Insurers viewed this as yet another effort by Plaintiffs' Counsel to extract every last cent from the Insurers' pockets. Tr. at 1464-65.

173. The global settlement discussions reconvened in the Court's chambers on the afternoon of August 26, 1993. All parties were represented. This was the first direct involvement of this Court in these discussions. The parties outlined their positions and the Court spent several hours listening to parties state their unwillingness to change their positions. In particular, Plaintiffs' Counsel sought to obtain from Fibreboard a contribution to the settlement of cash beyond the money to be paid by Fibreboard's insurers. No progress was made during several hours of those discussions. Tr. at 332-33, 1457-65.

174. Late in the afternoon on August 26, as the Courthouse was closing, the principal negotiators for each party were driven to the Court's home for further discussions.

After several more hours of discussion, Continental's counsel agreed to recommend to Continental an increase of $25 million and Fibreboard agreed to contribute $10 million remaining from its settlement with Home Insurance Company. Tr. at 333-35, 1465-73. The next morning, the Insurers agreed to this increase, and a global settlement amount of $1.535 billion was reached. Tr. at 1473-74.

175. The evidence is uncontroverted that throughout the negotiations conducted on August 26 and August 27, 1993, the Court's role was the normal role of a court assisting the parties in reaching an agreement, if they could do so. Tr. at 752-54, 1014-18, 1279-85, 1465, 1469, 2450-51.

176. Despite this agreement on the price of the settlement, Plaintiffs' Counsel continued to insist throughout the day on August 27 on a number of additional non-price conditions to a deal. These included issues with respect to interest payments on the $1.525 billion contribution of the Insurers to the Settlement, timing of the payment of the Fibreboard $10 million contribution, claims processing arrangements, the cut-off date for class membership (whether it should be the midnight preceding August 27 or the midnight yet to come), and, most significant, Plaintiffs' Counsel's insistence on a backup agreement between Fibreboard and the Insurers resolving the insurance dispute. Tr. at 1285, 1474-77.

177. Throughout the negotiations that followed the meetings in Dallas the week of August 9, 1993, Plaintiffs' Counsel insisted that they would not agree to a global settlement unless Fibreboard and the Insurers would agree to a "backup" resolution of the Coverage Case that would become

operative if for any reason a global settlement failed to achieve final court approval. Tr. at 1052-53, 1181-83, 1632. Plaintiffs' Counsel were unwilling to permit a circumstance in which the Insurers might get a "free look" at the ultimate result in the Coverage Case while a global settlement was pending approval in the courts. Tr. at 707-08, 913-14, 115354. The Insurers were unwilling to agree to such a condition unless such an agreement would cost them no more than a global settlement. This was resisted by Fibreboard, which contended that far more money would be required for defense costs outside the context of a global settlement to put Fibreboard in the same position it would be with a global settlement. Tr. at 332-36, 1474-78. The Insurers were nevertheless adamant that they would not agree to pay any more in the context of a backup agreement than in a global agreement, and, late in the afternoon of August 27, 1993, Fibreboard reluctantly acceded to this principle as the price of permitting an agreement to be reached with respect to a global settlement. Tr. at 334-36, 592-94, 1379-80. The backup settlement is what is now referred to as the "Trilateral Settlement."

178. During the afternoon of Friday, August 27, 1993, as discussions continued, the parties were advised that the California Court of Appeal, at the oral argument on the last phase of the Coverage Case appeal, had indicated that it would rule on the appeal expeditiously. Although this acted as a further impetus for resolving remaining differences, not until five o'clock in the afternoon on August 27 after this Court advised the parties that it would soon close for business was agreement reached in principle on the basic terms of the global settlement now before this Court (the "Global Settlement"). Tr. at 1480-81.

179. The terms of the Global Settlement agreement in principle were announced on August 27 in open court, as follows: Continental and Pacific, on behalf of Fibreboard, would pay into an escrow account their respective shares (pursuant to their sharing agreement) of the cash equivalent of $1.525 billion, plus interest commencing on August 27, 1993, such payment to be made no later than January 1, 1994.[20] In addition, Fibreboard would make a contribution of $10 million to the settlement. These funds would be used by the Trust to resolve either through litigation or settlement -the asbestos-related personal injury and death claims of a non-opt-out class of persons who have neither filed nor settled such claims before August 17, 1993. The unsettled present cases against Fibreboard would also be identified, and an additional amount -not as of then determined -would be budgeted to resolve them. It was anticipated that to the extent the unsettled present cases could be resolved for less than the budgeted amount, 80% of the difference would be transferred to the Trust. Fibreboard Exh. 592.

180. In addition, Fibreboard would assign to the Trust any and all claims for contribution and indemnity it might have against other joint tortfeasors arising out of certain asbestos-related personal injury claims. Fibreboard would also be responsible for the intake administration of claims for five years, and would be required to provide the Trust with all

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[20]The Global Settlement would be subject to final court approval. Upon such approval, the original amount in the escrow account, plus any accrued interest thereon, would be transferred into a settlement trust (the "Trust"). Should the Global Settlement fail to receive final court approval, the principal and interest in the escrow account would revert to the Insurers. Fibreboard Exh. 592.

information including information that would otherwise be protected by privilege or trade secret confidentiality -- as is reasonably necessary for the Trust to evaluate, defend and resolve the claims against it. The Insurers would be responsible for the costs associated with obtaining court approval of the Global Settlement, as well as any fees of Plaintiffs' Counsel that might be awarded by this Court up to a maximum of 3% of the settlement amount, which fees would not be paid out of the Trust's funds. Fibreboard Exh. 592.

181. As announced in this Court on August 27, 1993, in return for the monies to be paid under the Global Settlement Fibreboard and the Insurers would receive "total peace" with respect to any and all claims, direct or indirect, involving the asbestos-related personal injury and death claims of the class members. The Global Settlement would also include the complete resolution of the insurance coverage dispute between Fibreboard and the Insurers. A prerequisite to presentation of the Global Settlement for court approval was the conclusion of a separate backup agreement between Fibreboard and the Insurers settling the insurance coverage litigation, and provided funds to Fibreboard to be used for the satisfaction of claims against Fibreboard in the event that the Global Settlement were not approved. Fibreboard Exh. 592.

4. <u>August 27, 1993 to December 23, 1993</u>

182. On August 30, 1993, Fibreboard and representatives of the Insurers gathered in New York to work out the specific terms of the Trilateral Settlement, which was Plaintiffs' Counsel's precondition for negotiating the details of documenting the Global Settlement. Although there had been

an apparent agreement on the price term for the Trilateral Settlement on August 27, the parties did not have the same understanding of the agreement, and a week of difficult and contentious negotiations brought no resolution of their differences. Tr. at 336-38, 1482-85.

183. On September 8 and the morning of September 9, 1993, Fibreboard and the Insurers engaged in pressured and contentious negotiations in a further attempt to reach agreement on the terms of the Trilateral Settlement. Due at least in part to the pressure of the scheduled appearance before this Court, on the afternoon of September 9 Fibreboard and the Insurers agreed to submit to their clients for consideration a pricing formula that neither side would attempt to modify, <u>i.e.</u>, the decision to be made with respect to the deal was to be either affirmative or negative. The formula provided for a total price of $2 billion. Tr. at 1485-86.

184. Fibreboard had believed that by entering into the Trilateral Settlement it would be settling with the Insurers solely with respect to its asbestos-related liabilities. Continental, however, believed that the Trilateral Settlement resulted in a complete resolution of all liabilities under the policies: in effect, a complete policy buyout. After extensive, hard-fought negotiations on this point, Fibreboard acceded to Continental's position. Tr. at 336-37. In addition, Continental insisted that Fibreboard agree that the signing of a global settlement agreement - whether or not such agreement was finally approved by the courts - discharged all of Continental's obligations under the April 9 Agreement to use its best efforts to obtain a global settlement. Fibreboard also acceded to this demand. Tr. at 337-38.

185. The terms of the Trilateral Settlement, and of a series of provisions amending the April 9 Agreement, were described to this Court on September 9.[21] Tr. at 1487. Plaintiffs' Counsel then filed the complaint in this action later that day. Papers seeking provisional certification of the plaintiff class in this action (the Global Health Claimant Class) and a temporary restraining order against the filing of additional claims against Fibreboard or the Insurers were also filed. Tr. at 1487; Complaint, Dkt. No. 1 (Sept. 9, 1993); Motion for Preliminary Injunction and Temporary Restraining Order, Dkt. No. 7 (Sept. 9, 1993); Joint Motion for Provisional Class Certification, Dkt. No. 12 (Sept. 9, 1993). This Court thereafter granted the motions for provisional class certification and for a temporary restraining order. Order Granting Motion for Class Certification, Dkt. No. 16 (Sept. 9, 1993); Temporary Restraining Order, Dkt. No. 11 (Sept. 9, 1993).[22]

186. Fibreboard and the Insurers thereafter turned to formally documenting the Trilateral Settlement. During this period of time, Plaintiffs' Counsel did not engage in any negotiations of the terms of the Global Settlement.

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[21]The amendments to the April 9 Agreement were ultimately memorialized in a document entitled "Supplemental Agreement," which was executed on October 12, 1993. Tr. at 1488.

[22]On September 16, 1993, this Court granted the Insurers' motion seeking an extension of the temporary restraining order. Order Granting Motion to Extend Time of TRO, Dkt. No. 19 (Sept. 16, 1993). On September 27, 1993, this Court held a hearing on the Insurers' motion for a preliminary injunction enjoining the Global Health Claimant Class from commencing litigation against Fibreboard or the Insurers. Continental Exh. 17. On September 28, 1993, this Court granted the motion for a preliminary injunction. Preliminary Injunction, Dkt. No. 29 (Sept. 28, 1993).

Lengthy, hard-fought, arm's-length negotiations toward that end finally resulted in the signing of the Settlement Agreement (the "Trilateral Settlement Agreement") on October 12, 1993. Tr. at 336-38, 1482-88; Fibreboard Exh. 910. On that same day, an amended Continental-Pacific agreement was also signed setting forth the details of the Insurers' sharing arrangements, Continental Exh. 21, as was the Supplemental Agreement. Tr. at 1488.

187. Following the signing of the Trilateral Settlement Agreement, Plaintiffs' Counsel and representatives of Fibreboard and the Insurers turned to the negotiation and drafting of a written agreement reflecting the Global Settlement. Although the terms of the global settlement in principle had been put on the record on August 27, 1993, hundreds of detailed provisions that are contained in the fully documented agreement remained to be and were negotiated over a two-month period commencing in mid-October 1993. In additions, the "Third-Party Claimant Class Settlement" was negotiated during this time period. Tr. at 402-03, 1489, 1496-97.

188. The negotiations on the written global agreement were, for the most part, a slow and very contentious process, during which disagreements with regard to a number of significant issues arose. Tr. at 411, 1489. In particular, there were disputes among the parties regarding, inter alia: (i) the scope of the claims against the Insurers that would be extinguished by the global agreement, as to which the Insurers' position was that the Fibreboard insurance policies would be disposed of and the Insurers would thereby receive "total peace"; (ii) the meaning of the term "total peace" itself, which term had been used by counsel for the Insurers when the parties

originally announced the global agreement in principle in open court on August 27, 1993; (iii) which party or parties were to bear the risk of liability for claims that for some reason could not be extinguished; (iv) the indemnity obligations of Fibreboard and of the Trust to be created as part of the Global Settlement; (v) the process for amending the global agreement in the future; (vi) how to resolve issues related to claims asserted by Plant Insulation Company; and (vii) the operation of the Trust, including investment restrictions and spendthrift provisions. Tr. at 1489-96.

189. The formal documentation of the Global Settlement (the "Global Settlement Agreement"), as well as the Third-Party Claimant Class Settlement (entitled "Defendant Class Settlement Agreement and now referred to as the "ThirdParty Claimant Class Settlement Agreement"), were finalized, including the signatures of all the parties thereto, on December 23, 1993. Tr. at 1496-97; Fibreboard Exh. 912.

VI. KEY SETTLEMENT TERMS[23]

190. The Global Settlement Agreement and the Trilateral Settlement Agreement each operate to settle the Coverage Case and to extinguish all liability of the Insurers

[23]Because it is necessary to do so in order to explain the settlements under consideration, the Court has summarized various portions of the detailed agreements before it. There is no dispute before the Court about the meaning or intended operation of the language of these agreements, and these provisions are not before the Court for judicial construction. The Court does not intend any portion of these findings, including the summaries of the agreements which appear throughout, to be preclusive if disputes about the meaning or operation of these agreements should arise.

under or in connection with the policies. The two agreements operate, however, to create very different procedures for handling the proceeds from the settlement of the Coverage Case, with very different likely economic effects on the class members. Fibreboard Exhs. 910, 912.

A. The Global Settlement

191. The Global Settlement Agreement -which is subject to court approval - provides a structure for the handling of the proceeds of the Coverage Case settlement and the additional funds to be contributed by Fibreboard. The intentions of the parties to the Global Settlement Agreement (the "Settling Parties") in creating the procedure for handling the Coverage Case settlement proceeds are patent on the face of the Global Settlement Agreement. They are: (i) to resolve finally all asbestos-related personal injury claims of the Global Health Claimant Class against Fibreboard and the Insurers, and to direct such claims to the Trust; (ii) to provide for a simple, efficient process by which persons who were injured through exposure to Fibreboard asbestos could quickly obtain a fair settlement or resolution of their claims while safeguarding the claimants' rights to proceed against the Trust in the tort system; (iii) to enhance the likelihood that assets would remain available to injured class members whose claims develop far in the future by limiting how much of the Trust's assets can be paid in any given year; (iv) to prioritize payments so that in the event of any shortfall the sickest claimants are paid first; and (v) to protect the Trust's assets from unduly risky investments. Tr. at 1493-96, 1521-24; Fibreboard Exh. 912 (Global Settlement Agreement).

192. The Global Settlement Agreement settles all claims for asbestos-related personal injury or death against Fibreboard, Continental and Pacific by all members of the Global Health Claimant Class. Such claims include, without limitation, any and all asbestos-related claims for (i) personal injury, damage or death, and all forms of mental or emotional harm; (ii) loss of support, services, consortium, companionship, society, and other valuable services made by spouses, parents, children or other relatives, whatever such claims are called, including, without limitation, wrongful death or survival actions; (iii) punitive, aggravated or exemplary damages of any sort; and (iv) all claims arising directly or indirectly from any of the claims described in (i) through (iii) above, including direct action claims against the Insurers or any asbestos-related personal injury claims in which it is claimed that coverage is provided by any of the insurance policies issued by Continental or Pacific to Fibreboard. Fibreboard Exh. 192 (Global Settlement Agreement) at § 2.1.

193. Upon establishment of the Trust, all asbestosrelated personal injury and death claims of members of the Global Health Claimant Class against Fibreboard, Continental or Pacific under or in connection with the insurance policies will thereafter be directed to the Trust for processing and payment pursuant to the procedures set forth in the Trust Distribution Process ("TDP"). Fibreboard Exh. 912 (Exh. B, Annex A (TDP)).

194. Pursuant to the Global Settlement Agreement, Fibreboard, Continental and Pacific receive full releases from the members of the Global Health Claimant Class with respect to any asbestos-related personal injury or death

claim. In addition, the Global Settlement Agreement contains an agreement between Fibreboard and the Insurers that the Insurers are discharged from any and all obligations (whether direct or indirect) under or in connection with the insurance policies, whether with respect to asbestos-related personal injury and death claims or not, except of obligation specifically assumed or preserved in the various agreements between them. The claims that are subject to that agreement between Fibreboard and the Insurers include asbestos claims other than personal injury and death claims as well as nonasbestos-related claims, notwithstanding that persons or entities who may seek to assert such claims against the Insurers may not be members of either the Global Health Claimant Class or the Global Third-Party Claimant Class. Fibreboard Exh. 912 (Global Settlement Agreement) at §§ 2.2, 2.5, 2.6; Tr. at 395.

195. As noted above, transfer of the funds from the escrow account to the Trust will not occur until there has been final court approval of the Global Settlement Agreement, and entry of "Global Approval Judgment" as defined therein. Global Approval Judgment means one or more final, nonappealable judgments, order or decrees in a proceeding or proceedings in which Fibreboard, the Insurers, the Global Health Claimant Class members and all persons having or who may have Global Third-Party Claims[24] have been made parties, either directly or in a representative capacity, which, among other things, approves the terms and provisions of the Global Settlement Agreement and the Trust Agreement and TDP. In

[24]The formal definition of "Global Third-Party Claim" is set forth in the Glossary to the Global Settlement Agreement, Fibreboard Exh. 912 (Exh. A), under the term "Third Party Claim."

addition to such approvals, Global Approval Judgement must contain each and every one of certain specified provisions. These additional requirements are that the judgment must:

> declare with respect to the claims of both the Global Health Claimant Class and Global Third-Party Claimant Class that the settlement is fair, reasonable and adequate and was entered into in good faith; that the members of both classes have received adequate notice of the settlement; and that Global Health Claimant Class members have been adequately, professionally and ethically represented by class counsel; --approve the releases and indemnities contained in the Global Settlement Agreement, and the provisions in the Global Settlement Agreement and TDP for the resolution of the Global Third-Party Claims; --permanently enjoin Fibreboard from asserting against Continental or Pacific any claim released or discharged under the Global Settlement Agreement, and permanently enjoin any Global Health Claimant Class member or Global Third-Party Claimant Class member from asserting against Fibreboard, Continental, or Pacific any claim released or discharged under the Global Settlement Agreement; --discharge Fibreboard, Continental and Pacific from any further liability with respect to any Global Health

> Claimant Class Member Claim[25] or Global Third-Party Claim; declare to be fair, reasonable and non-collusive the provision in the Global Settlement Agreement under which Fibreboard and the Insurers agree that the Insurers shall be discharged from any further obligation under or in connection with the policies, except as specifically assumed or preserved under the various settlement agreements between them; --declare that only payments of funds pursuant to a Global Health Claimant Class member's individual settlement with the Trust, and not entry into or final approval of the Global Settlement Agreement, shall trigger the notice, approval and forfeiture provisions on the Longshore and Harbor Workers Compensation Act and any similar provisions of state and federal workers' compensation laws;--order all Global Health Claimant Class Member Claims, except for punitive or exemplary damages, which are not allowed and will be barred, directed to the Trust for disposition pursuant to the Trust Agreement and TDP;--order the parties to implement the Global Settlement Agreement; --order dismissal of this action, including all of the Global Health Claimant Class Member Claims (including all punitive and exemplary damage claims) against Fibreboard,

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[25]The formal definition of the "Global Health Claimant Class Member Claim" is set forth in the Glossary to the Global Settlement Agreement, Fibreboard Exh. 912 (Exh. A), under the term "Class Member Claim."

Continental and Pacific, on the merits, with prejudice to reassertion and without costs; -- determine and award the fees and expenses of counsel appointed to represent the classes; and --retain exclusive jurisdiction to: (a) enforce the Global Approval Judgment; (b) resolve any disputes with respect to the performance or interpretation of the Global Approval Judgment or Global Settlement Agreement; (c) adjudicate any attempt to challenge the Global Approval Judgment; and (d) oversee the maintenance, administration and distribution of the Trust and the funds contained therein, subject to and in accordance with the provisions of the Trust Agreement and TDP. Fibreboard Exh. 912 (Exh. A (Glossary)) at § 47.

196. For the Global Settlement Agreement to be finally effective there must also be a final, nonappealable order, judgment or decree of a court either approving or disapproving the separate Trilateral Settlement Agreement. Fibreboard Exh. 912 (Exh. A (Glossary)) at § 47.

197. The Global Settlement Agreement contains a number of provisions to deal with the possibility of a person or entity seeking to attack the Global Settlement Agreement subsequent to its final approval. Thus, the agreement provides that the Trust will indemnify Fibreboard, Continental and Pacific against any costs, fees, claims, liabilities, settlements or judgments incurred or occurring after the entry of Global Approval Judgment and resulting in any way from the assertion against any of them of any Global Health Claimant

Class Member Claim or any Global Third-Party Claim, including any claim attacking the validity or enforceability of Global Approval Judgment. Moreover, the agreement provides that, upon entry of Global Approval Judgment, Fibreboard will indemnify Continental and Pacific against any and all costs, fees, claims or liabilities relating in any way to claims arising from the exposure of a Global Health Claimant Class member to asbestos-containing products for which Fibreboard may be legally liable, including those attacking the validity or enforceability of Global Approval Judgment, except for (i) defense fees and costs directly attributable to such an attack, and (ii) costs, claims or liabilities that the Insurers have specifically undertaken to pay under the various settlement agreements. As to claims against Fibreboard that would not be covered by this indemnity, such as claims unrelated to asbestos, and that could be claimed to give rise to a direct action against the Insurers, Fibreboard agreed to reasonably and diligently defend and promptly pay such claims so as to preclude any such direct action claims. Fibreboard Exh. 912 (Global Settlement Agreement) at §§ 2.7, 2.8.

198. The terms of the Global Settlement Agreement are intended to provide the Insurers and Fibreboard with total protection with respect to claims arising from Global Health Claimant Class Member Claims, i.e., Global Third-Party Claims. Thus, the Global Settlement Agreement provides that it cannot be finally approved until the discharge of and injunction against Global Third-Party Claims are obtained. The Global Settlement Agreement contains provisions that deal with the possibility of the Court otherwise being unable to issue an order barring all such Global Third-Party Claims against Fibreboard, Continental and Pacific, including an agreement by members of

the Global Health Claimant Class to reduce, under certain circumstances, any judgments they obtain against Global Third-party Claimant Class members in such amounts (up to but not in excess of the amount of the judgment against any such Global Third-Party Claimant Class member) as may be necessary to permit the Court to issue orders providing for the discharge of and injunctions against such Global Third-Party Claims as is required for the entry of Global Approval Judgment. Fibreboard Exh. 912 (Global Settlement Agreement) at §§ 6.2, 6.3.

198A. The Provisions of the Global Settlement Agreement require a discharge of and injunction against Global Third-Party Claims. Two potential Global Third-Party Claimant Class Members, the Commonwealth of Pennsylvania and the State of Rhode Island, filed objections based on the Eleventh Amendment to the United States Constitution, arguing that they are immune from the jurisdiction of the United States district courts absent their consent, and therefore could not be bound by the settlement. During the course of the fairness hearing, the Court expressed the view that such an objection appeared to be well taken. Tr. at 338-339. The Settling Parties entered into a "Third Amendment to Global Settlement Agreement" ("Third Agreement") as of May 15, 1995. The Third Amendment, among other things, amends section 6.3(B) of the Global Settlement Agreement to provide that, in the event that the necessary discharges and injunctions against any Global Third-Party Claims cannot be obtained because it is shown or agreed among the Settling Parties that the Court lacks jurisdiction to enter such discharge or injunction, then Global Health Claimant Class members will reduce judgments in their favor against the holder of such Global Third-Party Claims in such amounts as may be necessary to extinguish any such Global Third-Party

Claims under applicable law. The Settling Parties have agreed that the fifty states of the United States (and their governmental units and divisions entitled to immunity under the Eleventh Amendment), and governments of foreign nations (and units and divisions thereof) entitled to sovereign immunity are not subject to the Court's jurisdiction.

198B. Pursuant to Court Order, the Settling Parties disseminated notice of the Third Amendment to all persons who were sent individual notice previously. No intervenor filed objections, nor did the Court receive any other written objections of substance. The subject of the Third Amendment came on for hearing, after notice, on June 20, 1995. No one appeared to object to the Third Amendment as it relates to the Eleventh Amendment and sovereign immunity points. The Court finds that the Third Amendment provisions calling for reduction in judgment respecting those Third-Party Claims of state and foreign governments (and their units and divisions) described in the preceding paragraph are fair and reasonable and necessary to avoid risk of failure of the Global Settlement Agreement through inability to obtain the necessary discharges of and injunctions against those Global Third Party Claims.

199. Fibreboard and the Insurers considered it important for several reasons that the Trust be structured so that it would be in the best position possible to provide compensation to asbestos claimants in the future, and to do so in a fair and equitable manner. First, they were aware of the experience of other trusts established in the mass tort contest, and especially the asbestos context, in which the interests of later claimants against the trust were not protected as well as the interests of earlier claimants. Second, they wanted to take into

account the possible effect that creating a fund in excess of $1.5 billion would have in generating additional claims. Third, they sought to minimize the likelihood that the Trust would be exhausted before compensating all claimants, causing future claimants to assert claims directly against Fibreboard and the Insurers. Finally, the parties wanted the Global Settlement - including the structure of the Trust and related TDP and spendthrift provisions - to be recognized as fair by class members and the plaintiffs' bar, as well as to be adjudicated as fair by the Court. Tr. at 1494-96, 1498-1500.[26]

200. The TDP negotiated by the Settling Parties provides the structure for the handling of claims against the Trust and equitably distributing Trust assets to claimants. The TDP mandates that claimants first seek to settle with the Trust. If that does not result in the disposition of the claim, the claimant must first proceed to mediation and then arbitration. If the claimant has not achieved an acceptable resolution of the claim, he or she may then try the claim in the tort system, subject to the overall limit of $500,000 per claim. Punitive damages and prejudgment interest are not available to any claimant against the Trust. Claims that are resolved against the Trust before resort to the tort system will be paid over three years; claimants who exercise their right to exit to the tort system after exhausting the specified claims processing procedures will be paid over as few as five years or as many as ten. Fibreboard Exh. 912 (TDP) at §§ C, D, F; Tr. at 1521-27.

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[26]The Settling Parties have not, however, represented that there is any guarantee that the funds in the Trust will in fact be sufficient to compensate all future claimants. To the contrary, they -and the Insurers in particular -have emphasized the uncertainty that exists in this regard. Tr. at 1500-02, 2241-60.

201. In order to make certain that some assets will always be available to claimants who assert claims against the Trust years into the future, the TDP contains spendthrift provisions that limit the proportion of Trust assets that can be paid in any one year. These limits leave some flexibility to the Trustees, but they operate to prohibit the exhaustion of Trust assets far into the future. Fibreboard Exh. 912 (TDP) at §§ E, F; Tr. at 1531-32. The Court finds that the Settling Parties adopted these limits as a reasonable attempt to ensure that funds would be available to pay future claimants.

202. Inasmuch as the Trust is limited in the amounts that can be paid to claimants in any given year, it was necessary to adopt a mechanism to distribute the Trust funds available in any given year in the event that those funds are insufficient to pay all claimants. The Settling Parties agreed upon a system in which claimants suffering from more serious disease are generally paid before those with less severe injuries, and within categories of injuries those claimants waiting the longest are paid first. Fibreboard Exh. 912 (TDP) at § F; Tr. at 1521-22.

203. Based on all of the evidence -- and particularly the testimony of Messrs. Snyder, Wartnick, Kazan, Cox and Koplow, which this Court finds to be credible -this Court finds that the Global Settlement was the result of extremely hard fought, arm's-length negotiations among the Settling Parties. Indeed, those negotiations were frequently contentious and even bitter. At numerous points the negotiations broke down and were almost scuttled entirely. Not until December 23, 1993, when the written Global Settlement Agreement was signed, was it clear that a final agreement would

actually be reached. The Court further finds that the record contains no evidence of collusion, and that the Global Settlement amount of $1.535 billion is well within the range of those values the Court could properly approve as a fair and reasonable compromise. Very few objections to the settlement have been asserted, despite the extremely extensive notice campaign that was conducted in connection with it. Findings of Fact ¶¶418-446. The Court finds that it is highly unlikely that the Insurers or Fibreboard would have agreed to pay more than the amounts they agreed to pay in the Global Settlement. This Court finds, based on the overwhelming credible evidence, that the Global Settlement is fair, reasonable and adequate.

204. On December 30, 1993, pursuant to Paragraph 3 of the Escrow Agreement, Fibreboard Exh. 912 (Exh. D), the Insurers transferred $1.525 billion to an escrow agent. On June 14, 1994, the Insurers executed an interpleader bond, agreeing therein to bind themselves to further appropriate orders of this Court concerning distribution of the fund. On June 16, 1994, this Court approved the form of the interpleader bond. The Insurers have complied with the terms of the interpleader bond and the Escrow Agreement. Tr. at 1542-43; Continental Exh. 26; Order, Dkt. No. 226 (June 16, 1994).

B. The Third-Party Claimant Class Settlement

205. A settlement with respect to the claims of members of the Global Third-Party Claimant Class has been agreed upon by Owens-Illinois, as representatives of the Global Third-Party Claimant Class, the Global Health Claimant Class representatives, Fibreboard and the Insurers. This settlement is embodied in the Third-Party Claimant Class Settlement

Agreement. The Third-Party Claimant Class Settlement Agreement represents a resolution of all Global Third-Party Claims that could be asserted against Fibreboard, Continental or Pacific. Fibreboard Exh. 912 (Exh. C).

206. The Third-Party Claimant Class Settlement Agreement contains three principal provisions: (i) that the Global Third-Party Claimant Class will release Fibreboard and the Insurers as to any and all Global Third-Party Claims and agree that Global Approval Judgement shall bar and enjoin permanently Global Third-Party Claimant Class members from prosecuting any Global Third-Party Claims against Fibreboard or the Insurers; (ii) that Fibreboard and the Insurers will release the Third-Party Claimant Class as to any and all contribution or indemnification claims; and (iii) that members of the Third-Party Claimant Class will have the rights set forth in Section H of the TDP. Fibreboard Exh. 912 (Exh. C) at § II.

207. Section H, in turn, affords different rights in three different scenarios that can arise. First, where a personal injury claimant liquidates his or her claim against the Trust before obtaining a judgement against a Global ThirdParty Claimant Class member, the class member receives a reduction of any judgment subsequently entered against it to reflect the personal injury claimant's recovery from the Trust, in whatever amount is dictated by the set-off, contribution, indemnity or similar principles of the applicable state law. For example, where state law provides for a pro tanto (i.e., dollar-for-dollar) set-off, any judgment against a Global Third-Party Claimant Class member will be reduced by the amount the personal injury

claimant received from the Trust. Fibreboard Exh. 912 (TDP) at § H1; Tr. at 2283-84.[27]

208. Second, where a personal injury claimant exhausts the Trust process and litigated against the Trust in the tort system, and also files suit against a Global ThirdParty Claimant Class member, the class member likewise receives a judgment reduction, in whatever amount is dictated by the applicable state law, for any joint-and-several portion of any judgment against it reflecting Fibreboard's liability share. Fibreboard Exh. 912 (TDP) at § H3; Tr. at 2285-86.

209. Third, where a personal injury claimant obtains a judgment against a Global Third-Party Claimant Class member prior to liquidating his or her claim against the Trust, and the Global Third-Party Claimant Class member pays the joint-and-several portion (if any) of that judgment, it succeeds to whatever rights the personal injury claimant would have had against the Trust. (There is one exception: if the class member were not satisfied with the Trust's offer, it - unlike a personal injury claimant against the Trust - would not be permitted to exit to the tort system; the matter would instead be resolved through binding arbitration.) Fibreboard Exh. 912 (TDP) at §§ H2, H5; Tr. at 2285.

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[27]Profession Edward Sherman is a distinguished law professor at the University of Texas. His particular fields of expertise are complex litigation, on which he has written books, and class actions, on which he has written numerous articles, including articles discussing asbestos litigation. Tr. at 2281; Owens-Illinois Exh. 1. At the fairness hearing, Professor Sherman presented cogent and credible testimony concerning the merits of the Third-Party Claimant Class Settlement Agreement.

210. The salient feature of the Third-Party Claimant Class Settlement is thus that it preserves all rights the Global Third-Party Claimant Class member would possess as against the Trust under applicable law in those cases where a personal injury claimant recovers from the Trust first; and it affords the Global Third-Party Claimant Class member all of the personal injury claimant's rights against the Trust (with the minor exception of the right to exit to the tort system) in those cases where such a claimant recovers from the class member first. For this reason, the Third-Party Claimant Class Settlement affects Global Third-Party Claimant Class members principally in that their contribution and indemnification claims will be addressed through set-offs and subrogation rights stemming from settlements and proceedings involving the Trust, rather than Fibreboard or the Insurers. Fibreboard Exh. 912 (TDP) at § H1, Tr. at 1511-13, 1561-64, 2285-87.

211. The Court finds that the Third-Party Claimant Class Settlement redounds to the substantial benefit of Global Third-Party Claimant Class members. By facilitating the Global Settlement, the Third-Party Claimant Class Settlement creates a trust with over $1.5 billion available to pay claims and, in accordance with applicable law, to offset obligations of members of the Global Third-Party Claimant Class. Tr. at 2295-96. Very few objections to the Third-Party Claimant Class Settlement have been asserted.

212. In addition, the Court finds that the ThirdParty Claimant Class Settlement provides a reasonable, reliable, fair and predictable mechanism to handle third-party claims. Tr. at 2288. Because the Third-Party Claimant Class Settlement avoids intensive litigation of the sort that occurred

in the Manville proceedings, the complexities of attempting to create a new rule in the tort system, and the uncertainties of leaving third-party issues to further litigation, this Court finds that the Third-Party Claimant Class Settlement is better than any alternative. Tr. at 2293-95.

213. The Court finds that the Third-Party Claimant Class Settlement also minimizes defense and other transaction costs incurred in the resolution of Global Health Claimant Class members' claims against Fibreboard, thereby increasing the amount of money the Global Health Claimant Class will receive reflecting Fibreboard's share and, derivatively, the size of the set-offs Global Third-Party Claimant Class members will receive. Tr. at 2296.

214. The Court finds that the Third-Party Claimant Class Settlement further allows for the husbanding (through the TDP) of the assets available to pay Fibreboard's liability share, thereby giving Global Third-Party Claimant Class members greater assurance that a source of set-offs will exist for an extended period of time. Tr. at 2289-91, 2295.

215. Finally, the Court finds that the Third-Party Claimant Class Settlement confers upon Global Third-Party Claimant Class members the substantial further benefits of (i) releasing them from any contribution or indemnification claim by Fibreboard or the Insurers; (ii) increasing the likelihood that Fibreboard will be able to meet its unfunded obligations on its settlements of present cases, Tr. at 404-06; and (iii) entitling them to obtain information about personal injury claims received by the Trust in the claims process, thereby reducing the need for them to conduct discovery. Tr. at 229192.

216. The Court finds that the Third-Party Claimant Class Settlement Agreement was the product of negotiations among Plaintiffs' Counsel, Fibreboard and representatives of the major asbestos manufacturers. The credible evidence demonstrates that these negotiations were sophisticated, arm's-length and non-collusive. Indeed, these negotiations resolved an issue that has been the subject of contentious disputes in other asbestos-related settlement proceedings, such as Georgine and Manville. Tr. at 401-05, 1195.

217. The overwhelming credible testimony demonstrates, and this Court finds, that the Third-Party Claimant Class Settlement Agreement is fair, reasonable and adequate, and that its benefits far outweigh the incidental restrictions it places on members of the Global Third-Party Claimant class.

C. The Trilateral Settlement

218. The Trilateral Settlement Agreement, which by its terms is subject to the court approval, settles the insurance coverage disputes between Fibreboard and the Insurers whether or not the Global Settlement is approved or successfully withstands subsequent attack. Tr. at 1507-09; Fibreboard Exh. 910 at § 4.1. The Trilateral Settlement Agreement provides that, upon specified court determinations, Continental and Pacific shall be discharged from any further obligations or liabilities to Fibreboard or to any other person or entity under or in connection with the insurance policies issued to Fibreboard whether asbestos-related or not (expect for obligations that an Insurer has specifically assumed or preserved

under the Trilateral Settlement Agreement, the April 9 Agreement, the Global Settlement Agreement or the Supplemental Agreement). Tr. at 337; Fibreboard Exh. 910 at §§ 1.1, 4.1 The Trilateral Settlement Agreement does not, however, preclude the assertion of any such claims against Fibreboard. Tr. at 377-78. In addition, the Trilateral Settlement Agreement provides for Fibreboard to indemnify Continental and Pacific against certain further asbestos-related personal injury claims whether or not the Global Settlement is approved or successfully withstands collateral attack. Fibreboard Exh. 910 at § 3.3.

219. The Trilateral Settlement Agreement provides for alternative handling of the consideration paid by the Insurers depending on whether or not the Global Settlement is finally approved. Tr. at 375-79; Fibreboard Exh. 910 at §§ 2.2, 2.3. If the Global Settlement is approved, and the Global Approval Judgment described in the Global Settlement Agreement is entered, the $1.525 billion that the Insurers have paid into an escrow fund (to be supplemented by $10 million from Fibreboard), together with interest and earnings thereon, less certain expenses and amounts paid for interim claims, will be directed to the Trust established pursuant to the Global Settlement Agreement to settle claims of the future asbestos claimants and to pay Trust expenses. If the Global Settlement is not approved but the Trilateral Settlement is approved, the $1.525 billion plus interest from the Insurers, plus an additional $475 million, less certain deductions, will be made available to Fibreboard, either directly or through a trust, to enable Fibreboard to pay defense costs and claims with respect to asbestos-related personal injuries -not only claims not filed or settled prior to August 27, 1993, but also asbestos-related

personal injury claims against Fibreboard that were unsettled as of August 23, 1993. Fibreboard may also use up to $65 million from these funds for costs associated with asbestos-related property damage claims and non-asbestos claims. Fibreboard Exh. 910 at §§ 2.2, 2.3; Tr. at 374-77.

220. The credible evidence establishes, and the Court finds, that the Trilateral Settlement was the result of extremely hard fought, arms's-length negotiations between Fibreboard and Continental. The negotiations leading to the Trilateral Settlement were intense and contentious, and there is a complete absence of evidence of collusion in connection therewith. The Court further finds that the Trilateral Settlement is fair and reasonable.

D. The Longshore Settlement

221. On December 5, 1994, the Global Health Claimant Class representatives, on behalf of themselves and the Global Health Claimant Class, Bethlehem Steel Corporation, on behalf of itself and a class of employers and insurance carriers (the Longshore Defendant Class), and the Director, Office of Workers' Compensation Programs, United States Department of Labor (the "Director"), entered into a settlement with respect to certain rights and obligations that members of the Global Health Claimant Class and members of the Longshore Defendant Class might have under the Longshore and Harbor Workers Compensation Act ("LHWCA"), 33 U.S.C. §§ 901, et seq., and related statutes. A full discussion of this settlement, and Findings of Fact related thereto, are set forth below at Findings of Fact ¶¶ 398-417.

VII. FUTURE CLAIMS AND VALUE PROJECTIONS AND THEIR IMPLICATIONS FOR THE THREE LITIGATION/SETTLEMENT SCENARIOS BEFORE THE COURT.

222. The Court has heard detailed testimony and received reports from three distinguished outside experts -- Dr. William Nicholson (identified above at Findings of Fact ¶ 97), Dr. Thomas Vasquez of KPMG Peat Marwick, and Dr. Mark Peterson of Legal Analysis Systems - concerning the number, mix and timing of the asbestos personal injury claims that Global Health Claimant Class members can be expected to bring against Fibreboard (or the Trust) over the next several decades. In addition, the Court has received extensive evidence from Dr. Peterson going to the appropriate valuation of such claims, as well as to the anticipated costs of defense and administration relating to such claims, both on the assumption that Fibreboard remains in the tort system and on the assumption that the Trust becomes operations. The Court finds that Drs. Nicholson, Vasquez and Peterson each used well established and scientifically reliable methods to estimate future claims activity. The Court has also had the benefit of testimony by experienced and knowledgeable counsel, representing both the Global Health Claimant Class and Fibreboard, as to what the future holds for Fibreboard in terms of claims of the Global Health Claimant Class members and the cost of those claims. Tr. at 836-97, 1786-2279, 25652641; Continental Exhs. 33-37, 37A-37D, 48-51, 51A, 51B, 52, 54; Fibreboard Exhs. 823, 826; Class Plaintiffs Exhs. 1010, 1016.

223. The Court finds that there are a great many uncertainties associated with any effort to project the

number of future asbestos personal injury claims and their costs. Indeed, in the Court's view, the only certainty in this area is that any prediction of an exact overall number of claims, or their exact mix, or their exact dollar value, or the exact amount of costs associated with their handling (in or out of the tort system), will in the end prove incorrect. Tr. at 1993-2000, 2262-63, 2266. Continental Exhs. 34 at 2 & Exh. A.

224. Despite the inherent uncertainties involved, and the impossibility of predicting the future with precision, the Court finds the work of the experts and the views of counsel to be of material assistance in arriving at a reasoned assessment of the risks associated with each of the three basic "scenarios" that are presented by the record: the "Coverage Case scenarios"; the "Trilateral Settlement scenario"; and the "Global Settlement scenario."

225. The Coverage Case scenario assumes that neither the Global Settlement nor the Trilateral Settlement receives final court approval -the parties instead being remitted to continued litigation of Global Health Claimant Class member claims in the tort system, and to prosecution of the Coverage Case to a conclusion in the California courts. The Coverage Case scenarios entails a significant risk that Fibreboard will be left either with no relevant insurance coverage at all or with coverage for only a small fraction of its total asbestos-related personal injury liability. Findings of Fact ¶¶ 34-58. In such an event, it is obvious - in light of (i) the relative insubstantiality of Fibreboard's non-insurance resources, Findings of Fact ¶¶ 59, 96; and (ii) its large exposure to presently existing claims (both settled and unsettled) -that in the event it lost the Coverage Case Fibreboard would at best be able to meet only a small portion

of its total liability to the Global Health Claimant Class, and that allowance of individual, "first come, first served" actions and adjudications with respect to Global Health Claimant Class members' claims would rapidly exhaust all available assets and would leave the great bulk of the class uncompensated. Tr. at 168-69, 1056-57, 2321-23.

226. There is, of course, also the FibreboardContinental dispute concerning the consequences (if any) of Fibreboard's unilateral assignments to asbestos claimants of rights under the Continental policy. Should Continental finally prevail in its position (vigorously disputed by Fibreboard) that Fibreboard's assignment program entirely vitiated the Continental insurance, Fibreboard would be left with only several hundred million dollars to cover both preand post1959 claims. Any such outcome would render a Fibreboard Coverage Case victory hollow indeed, and would guarantee, again, a massive shortfall in funds to compensate the Global Health Claimant Class -and therewith a substantial misallocation of Fibreboard's resources in the event individual actions and adjudications with respect to class member claims were permitted. Tr. at 148-49, 169-70, 1545; Fibreboard Exh. 905.

227. The Trilateral Settlement scenario, while eliminating the Coverage Case risk, nevertheless is problematical for the Global Health Claimant Class. While the Court credits as genuine the optimism expressed in Fibreboard's public statements and in the testimony of Mr. Snyder, its counsel, the Court also notes that Fibreboard's counsel acknowledges a "substantial risk" that the funds provided under the Trilateral Settlement could in the end prove insufficient to assure Fibreboard's survival and provide compensation to all asbestos

claimants against it. Tr. at 437. Given the many uncertainties involved, the Court cannot adopt with confidence either the view of Fibreboard counsel or the pessimistic view of those, including Mr. Kazan and Dr. Peterson, who think it clear that Fibreboard would fall substantially short of meeting all claims under a Trilateral Settlement regime. On the complete record, the Court finds that there is a significant risk that the Trilateral Settlement (even augmented by Fibreboard's non-insurance assets) would leave a "late-comer" component of the Global Health Claimant Class without compensation in the event individual actions and adjudications with respect to class member claims were to be permitted. Tr. at 696-98, 914-16, 1201-05, 2053-54, 2059-60, 2667-74; Fibreboard Exh. 919; Continental Exhs. 34 at 65 (Table 39), 37A-37D.

228. Although, again, there are substantial uncertainties involved, and although there is a significant risk -- more than a mere possibility -that there will be a shortfall, the Court finds it more probable than not that under the Global Settlement scenario all Class claims will be paid at fair and appropriate values, although it is not unlikely that some claims may have to be deferred for some time pursuant to the spendthrift provisions of the Trust. Tr. at 2001-02, 2042-47; Continental Exhs. 35 (Table 38a), 37B37D, 49; Class Plaintiffs Exhs. 1010, 1012, 1019, 1020.

229. In particular, the Court finds no credible evidence that the 1992-93 spike in claims against Fibreboard represents a material permanent increase in the propensity of asbestos victims to sue Fibreboard. Rather, the Court accepts the consensus view of the experts that the phenomenon is a temporary one caused by certain non-recurring events -- such as

the Georgine class action, an increase in case consolidations, the Fibreboard group settlement program and the public awareness (at least among the asbestos plaintiffs' bar) of the very negotiations leading to the Global Settlement itself. Tr. at 2010-11; Fibreboard Exh. 826; Continental Exhs. 37, 37A-37D. Further, the 1992-93 increased filings appear in significant measure either (i) to represent an acceleration of claims that would have been filed later anyway, rather than a real increase in the number of filings; or (ii) to the extent they did represent real new sources of filings, to be of materially lesser severity than Fibreboard's usual historical mix of claims. Tr. at 417-20, 2010-18, 202526, 2036-38; Fibreboard Exhs. 800-819. Finally, the Court notes that even the expert who expects the largest number of claims Dr. Peterson believes that, "under any plausible scenario of a great number that [he has] examined, " the Trust will have enough money to pay all claims. Tr. at 2002; Continental Exh. 49.

230. The Court further finds, upon the expert testimony and the entire record: (i) that the risks to the Global Health Claimant Class from the Coverage Case were such as to make it imperative for the Global Health Claimant Class to seek a reasonable global settlement with Fibreboard and the Insurers; (ii) that, indeed, the Coverage Case risk would have justified the Global Health Claimant Class in accepting such a settlement at a significant discount from whatever dollar amount might have been perceived to be necessary to provide compensation of all class members at appropriate and fair values; (iii) that in fact Plaintiffs' Counsel nevertheless held to their goal of accepting no discount from full value; and (iv) that the Global Settlement ultimately achieved is likely to provide fair and appropriate

compensation for all members of the Global Health Claimant Class.

VIII. COMPARISON OF GLOBAL AND TRILATERAL SETTLEMENTS

231. The Ortiz Intervenors have asserted that the Trilateral Settlement is, from the standpoint of Global Health Claimant Class Members, preferable to the global settlement, and thus the Global Settlement should not be approved by this Court.[28] Ortiz Intervenors Amended Objections, Dkt. No. 428 (Nov. 28, 1994). However, this Court finds, based on the credible evidence presented at the fairness hearing, that if it were up to the Court to choose between the two the Global Settlement is far preferable to the Trilateral Settlement from the standpoint of class members. The Court makes this finding based on a number of factors.

232. The Court finds that the funds available to resolve Global Health Claimant Class member claims under the Global Settlement are approximately equivalent to the funds available to resolve those claims under the Trilateral Settlement, after allowance is made for resolution of unsettled present

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[28]Various objectors -- in particular the Ortiz Intervenors and the Flanagan Intervenors -- have advanced a wide array of objections to the Global Settlement. Generally speaking, these objections go to legal matters, rather than to any material factual disputes. All such legal objections are treated separately in this Court's conclusions of law. The Court finds, however, that as to any objections based on issues of fact, the Court has considered those objections and finds them to be without any basis in the record. Accordingly, the Court rejects those objections. There is no credible evidence that the Global Settlement is unfair, unreasonable or inadequate in any respect.

claims and other items under the Trilateral Settlement. Tr. at 378-85, 2667-68; Fibreboard Exh. 919 (Tab 1). However, the Global Settlement will provide substantially more money that actually reaches class members for compensation of their claims than will be provided to them under the Trilateral Settlement. This Court finds that the amount that would actually reach class members under the Trilateral Settlement would be at least hundreds of millions of dollars less than under the Global Settlement. Tr. 200203, 2054-56; Continental Exhs. 34 at 66-67 & Table 40, 37, 37A. And although there is a significant risk under the Global Settlement that there will be insufficient funds to compensate all class members, under the Trilateral Settlement there is a greater likelihood that the funds will be insufficient to compensate all class members. Tr. 2058-60; Continental Exhs. 37B-37D. The Court finds that, under the Global Settlement, the operation of the Trust pursuant to the Trust Agreement and TDP will result in a far more costeffective system that promotes the settlement of claims rather than the defense of them. Tr. at 2056-57; Continental Exh. 48F.

233. According to Mr. Snyder, in order to survive under the Trilateral Settlement, Fibreboard would have to reduce settlement values down to one half of current levels -- an endeavor that would of necessity entail massive costs of defense. Tr. at 433-37, 2661-62, 2672-73. Accordingly, this Court finds that defense costs would be drastically less under the Global Settlement than under the Trilateral Settlement. Under the efficient claims administration and resolution procedures of the Trust, all transaction costs would likely constitute less than 15% of total Trust outlays. Tr. at 379. In very stark contrast, the Court finds that under the Trilateral Settlement there is a substantial likelihood that Fibreboard would -- in a reasonable

effort to protect is corporate existence -- engage in an intensive litigation defense effort. In the past, Fibreboard has been able to lower asbestos-related claims settlement values on a regional basis, but doing so necessarily entailed a very large increase in defense costs. Likewise, before its entry into the ACF Fibreboard was historically a regional defendant, with its exposure to asbestos-related liability concentrated in the West Coast and Gulf Coast areas. As the Court has found, that exposure expanded nationally under the ACF. Findings of Fact ¶¶ 31-33. Under the Trilateral Settlement scenario, Fibreboard might reasonably determine to incur very substantial defense costs in an effort to return to its more limited pre-ACF geographic exposure, as other defendants -e.g., Owens-Illinois -have done. Tr. at 379-85, 2644, 2668-69, 2674-76.

234. Although Fibreboard's litigation strategy under the Trilateral Settlement cannot be determined with certainty, the credible evidence including testimony from Fibreboard's litigation counsel, Mr. Snyder demonstrates that there is a substantial likelihood that Fibreboard would spend a significant portion of the monies made available to it pursuant to the Trilateral Settlement on defense costs in an effort to achieve its litigation goals. Indeed, in the initial years under the Trilateral Settlement regime it is likely that Fibreboard would expend more of the Trilateral Settlement funds on defense costs than on indemnity payments to claimants. Tr. at 379-81, 433-35.

235. The costs of defending asbestos personal injury tort claims against Fibreboard have been both substantial and highly variable, depending on the defense and settlement strategies employed by the company over time. From the time

the ACF ceased operations in September 1988 through 1989, defense costs were $50 million. During the same time, Fibreboard agreed to pay $25 million in settlements, yielding a ration of 2:1 between defense costs and settlement amounts. In contrast, during 1990 annual defense costs were $52 million and Fibreboard settled cases under the SSP amounting to $45 million, a defense to indemnity ration of somewhat more than 1:1, but found itself increasingly drawn into major consolidated trials. Under the assignment settlement program in 1991 and 1992, the ratio of defense costs to settlement amounts was quite low. Defense costs were $26 million in 1991 and $21 million in 1992, while settlement agreements in those years totaled, respectively, $261 million and $943 million. In these years, settlement amounts were substantially higher than would have been paid had Fibreboard been settling with cash, and thereby minimized litigation activity and defense costs. The resulting paper indemnity commitments were relatively high and defense costs were relatively low. Tr. at 230-31; Fibreboard Exh. 919 (Tab 3). The Court finds that Fibreboard's defense costs during the years of the assignment settlement program are not useful to predict Fibreboard's defense costs under the Trilateral Settlement scenario. The Court finds that Fibreboard's pre-1991 experience is probative on this issue.

236. The Court finds that defense costs under the Trilateral Settlement scenario would be very substantial. In the early years of the Trilateral Settlement, it is likely that Fibreboard would spend more on defense costs than on indemnity payments. Tr. at 621-22. While defense costs would vary depending on changes in corporate defense strategy, those costs would markedly reduce the net amount available to

injured class members under the Trilateral Settlement. Tr. at 432-35.

237. Moreover, under the Global Settlement, claimants' attorneys' fees are limited to 25% of a claimant's recovery against the Trust in contrast to the 33%-40% fees claimants' attorneys' would often recover under the Trilateral Settlement --thus increasing the compensation that is provided to claimants rather than the their lawyers. Tr. at 379-81.

238. Additionally, the Court finds that, under the Global Settlement, the operation of the Trust pursuant to the Trust Agreement and TDP will result in a far more efficient and equitable system of administering claims and compensating claimants. A claim against the Trust will, on average, be processed and resolved much more quickly than a similar claim would be processed and resolved in the tort system under the Trilateral Settlement. Continental Exh. 40 at ¶¶ 8-13. As or more importantly, the Court finds that operation of the Trust under the Global Settlement will as it is designed and intended to do provide a fair method for compensating claimants against the Trust that is more efficient and less burdensome than those claimants would experience under the tort system. This Court finds, based on the credible evidence, that the Global Settlement will largely mitigate or eliminate the "race to the courthouse" among plaintiffs' lawyers that could well occur under the Trilateral Settlement, and that would likely result in the inequitable distribution of settlement funds to claimants. Tr. at 914-16, 924-25. Accordingly, this Court finds that the Global Settlement will substantially reduce the risk that would otherwise exist under the tort system that later claimants will receive no compensation for their claims, or only a fraction of

the compensation that earlier comparable claimants will receive. Tr. at 2058-60; Continental Exhs. 37B-37D, 40.

239. This Court finds that the Global Settlement will eliminate the unpredictable and sometimes unfair results that have been -- and under the Trilateral Settlement would continue to be -- experienced in the tort system.

240. Finally, the Court is aware of, and takes judicial notice of, the various legislative proposals currently under consideration in the United States Congress that could substantially alter the operation of the tort system itself. See, e.g., H.R. 10 (the "Common Sense Legal Reforms Act of 1995"), 104th Cong., 1st Sess. § 103 (1995). Accordingly, this Court finds that there is real uncertainty as to the future ability of asbestos claimants to recover compensation in the tort system, an uncertainty that the Global Settlement mitigates. Tr. at 911-13, 2770.

241. Although this Court finds that the Global Settlement is far preferable to the Trilateral Settlement from the point of view of all class members, this Court also finds that the Trilateral Settlement is far preferable to no settlement at all -- i.e., to a return to the appeal of the Coverage Case. The credible evidence is overwhelming in support of this finding.

242. Simply stated, the question is whether -- from the standpoint of class members it is preferable to (i) accept the known terms and benefits of the Trilateral Settlement (foremost of which is a $2 billion payment to Fibreboard from the Insurers); or (ii) gamble on both the outcome of the Coverage Case appeal and the possibility, regardless of the

outcome of that appeal, that Fibreboard would be found to have vitiated its coverage under the Continental policy by its assignment settlement program. Given the extent of those risks, and -- given Fibreboard's limited non-insurance assets -- the devastating effect that such outcomes would have on class members, this Court finds that the answer is clear: the Trilateral Settlement is far superior to no settlement at all. Tr. at 913-14.

243. A fortiori, for all the reasons this Court has found, supra, that the Global Settlement is preferable to the Trilateral Settlement, Findings of Fact ¶¶ 231-242, together with the fact that the Global Settlement -- like the Trilateral Settlement -avoids the significant risk of a Fibreboard loss of the Coverage Case, Tr. at 771-93, this Court finds that the Global Settlement is a far preferable to the Coverage Case scenario.

IX. ADDITIONAL FAIRNESS CONSIDERATIONS

A. Operation of the Trust

244. The Court has carefully considered both the terms and operation of the Trust Agreement and the TDP. Dr. Peterson has testified, and the Court finds, that the Trust Agreement and TDP fairly reflect the most modern and sophisticated thinking, making effective use of the information gleaned from prior experience to improve on claims-payment trusts created in other proceedings. Tr. at 2066-77. The Court finds that the Trust Agreement and TDP, taken together as a whole, and with respect to each of their provisions, are fair, reasonable and adequate.

245. The Court finds that the TDP provisions that require that claimants against the Trust first pursue informal avenues for resolving their disputes before bringing them to the tort system provide affirmative benefits both the members of the Global Health Claimant Class and the judicial system itself. These provisions constitute, in effect, alternative dispute resolution mechanisms that are substantially more efficient than the tort system. Tr. at 374-77, 380-83. Accordingly, the Court finds that the fact that those claimants who ultimately exercise their back-end right to pursue claims in the tort system first have to seek informal resolution of their claims is not a significant detriment to the class.

246. Where the need to preserve funds makes it impossible to pay all claims without deferral, the TDP seeks to give priority to those who are most seriously ill -- paying mesothelioma victims first, then asbestos-related lung cancer victims, then other cancer victims, and then those with nonmalignant conditions defined in order of priority as Asbestos Lung Disease-1 ("ALD-1") and Asbestos Lung Disease-2 ("ALD-2"). Fibreboard Exh. 912 (TDP) at 23-25, § F.2.

247. Dr. Richard Kradin, a board certified specialist in pathology, pulmonary medicine and internal medicine, testified without contradiction that the requirements imposed under the Global Settlement for establishing medical diagnoses are reasonable, and that the required test procedures are widely available. Tr. at 531-34, 543-44, 550-51. Dr. Kradin also agreed that the disease process described in the TDP as ALD-1 is, generally speaking, more serious than that described in ALD-2, that the definitions of these disease processes adopted by the agreement are fair and reasonable, Tr. at 545,

and that they encompass all nonmalignant asbestos-related effects that are accepted in the medical and scientific community. Tr. at 546. The definition of mesothelioma is, perhaps, over-inclusive. Tr. at 547. The definition of asbestos-related lung cancer in the agreement is the broadest definition acceptable to the medical and scientific communities -- the most liberal view from the claimant's perspective. Tr. at 548.

248. The Court credits Dr. Kradin's testimony and adopts his conclusion that the disease categories set forth in the TDP fairly reflect the medically recognized categories of asbestos-related diseases, and fairly account for the relative seriousness of the respective conditions.

249. Dr. Bradford Cornell, an expert in finance and computer simulations of financial models, testified about the Trust's operation and capacity to pay claims under various assumptions. Tr. at 1668, 1671-73; Fibreboard Exh. 920. Those assumptions included the average settlement values estimated by Plaintiff's Counsel and the claims projections made by Dr. Nicholson and others. Tr. at 1686-91; Class Plaintiffs Exhs. 1017-1021. These simulations required Dr. Cornell to project the Trust's earning capacity over the next forty years. Since such a projection of future earnings, of course, cannot be quantified with precision, Dr. Cornell presented a series of alternative projections of Trust earnings depending upon what the economic conditions might be over the next forty years, and the likelihood of experiencing different kinds of economic conditions over that period. Class Plaintiffs Exhs. 1019-1021; Fibreboard Exhs. 921, 922A922D.

250. The Settling Parties asked Dr. Cornell to model the claims payment and spendthrift provisions of the Trust and, after doing so, to run the projections made by Plaintiff's Counsel and Dr. Nicholson, Dr. Peterson, the Ortiz Intervenors and Professor Eric D. Green (the Guardian Ad Litem for the Global Health Claimant Class, see Findings of Fact ¶¶ 377-397). His resulting calculations demonstrated that the Trust will be able to pay all claims as they are submitted, assuming:

(1) the more likely economic conditions will prevail over the next 40 years;

(2) case settlement values will approximate the analysis made by the Plaintiffs' Counsel; and

(3) the future number of cases will be at or just beyond the upper end of Dr. Nicholson's projections.

Tr. at 1699-1707; Class Plaintiffs Exhs. 1017-1021.

251. As noted, predictions about the future are fraught with uncertainty. As Dr. Cornell has made clear, there is always a possibility that the economic environment over the next forty years might be significantly less advantageous than it has been over the past forty years, or that adverse economic conditions might prevail during the first few years of the Trust's existence, when it has the most money on hand and the largest number of claims to pay. If so, then the Trust might well find itself unable to pay all the claims filed against it. Tr. at 1707; Class Plaintiffs Exh. 1021. Similarly, if the current projections

of future claims are underestimated, or if settlement values prove higher than now estimated, there could well be insufficient funds in the Trust to pay all claims. Class Plaintiffs Exh. 1020. In those circumstances, the TDP will favor those claimants with the most serious illnesses. Fibreboard Exh. 912 (TDP) at § F.

252. The Court finds that the Trust Agreement and TDP reflect the considered and correct judgment of the Settling Parties that it is necessary and appropriate to preserve Trust assets so that fair compensation is paid not only to claimants who contract asbestos-related diseases in earlier years, but also to those who contract diseases in later years. The Court finds that it is fair and reasonable for the Settling Parties to seek to accomplish this end.

253. The Court finds that the spendthrift provisions of the Trust are reasonably and carefully crafted to seek to achieve the objective of providing fair compensation to all claimants.

254. Three initial trustees have been selected and have agreed to oversee the Trust. Professor Francis McGovern, of the University of Alabama, is known to this Court and to both Plaintiffs' and defendants' attorneys in asbestos litigation as a distinguished law professor in the field of mass torts. His experience includes service as a special master in the Baltimore and Ohio asbestos litigation cases. Tr. at 39394. Charles Renfrew is a former United States District Court Judge in the Northern District of California, a distinguished member of the California bar, and a former Justice Department official and General Counsel of Standard Oil Company. Tr. at 394. The third trustee is Henry Ramsey, Jr.

Judge Ramsey was a Superior Court Judge in Oakland, California, where he presided over and managed the entire Alameda County asbestos docket. For several years he has been Dean of the Howard University Law School. Tr. at 394. The Court finds that Professor McGovern and Judges Renfrew and Ramsey are eminently qualified to serve at trustees of the Trust created pursuant to the Global Settlement.

B. Limitations on Claims Against the Trust

255. As discussed herein, Findings of Fact ¶¶ 200217, the members of the Global Health Claimant Class agreed in the Global Settlement to, among other things: (i) a waiver of their rights (if any) to receive punitive damages from the Trust; (ii) a cap on recoveries against the Trust of $500,000 per claimant; (iii) a waiver of their rights (if any) to recover preand post-judgment interest on awards against the Trust; and (iv) a limit on their ability to recover against the Trust to Fibreboard's several share of liability. These bargained-for concessions by the Global Health Claimant Class serve to preserve the Trust corpus from a few individual and/or early demands that could have the effect of reducing all class members' claims.

256. In light of Fibreboard's history, this Court finds that the waiver of punitive damages is not a significant concession. As previously found, Findings of Fact ¶ 25, with possibly one exception Fibreboard has never paid punitive damages in the tort system. In the few instances where juries have awarded punitive damages against Fibreboard, the cases were ultimately settled for amounts that substantially or entirely discounted the punitive damages component. Tr. at 399400,

1037-38. Moreover, to whatever extent the risk or actual jury award of punitive damages have affected the values of settlements with Fibreboard, that effect is reflected in the historic settlement values that the parties considered in negotiating the Global Settlement, and the trustees of the Trust will have that information available to them in making offers to individual Global Health Claimant Class members. Tr. at 402, 1037-38.

257. This Court finds that the limitation of awards to $500,000 per claimant is also, as a practical matter, a small concession on the part of the Global Health Claimant Class. Tr. at 940-41. In Fibreboard's history there have been approximately twelve individual settlements by Fibreboard in excess of $500,000. Tr. at 401. The $500,000 cap also reasonably reflects the maximum exposure, per claimant, that the Insurers could have faced under their respective policies. Under the circumstances, the Court finds credible and adopts Plaintiffs' Counsel's testimony that the practical impact of the $500,000 limitation is small and the limitation is fair to the class as a whole. Tr. at 940-41.

258. This Court finds that the waiver of pre- and post-judgment interest is fair in light of the structure of the Global Settlement. This Court finds that the Global Settlement is designed to provide significantly faster and more efficient resolution of asbestos claims than the tort system, with significantly less transaction costs and greater certainty of fair compensation being paid within a reasonable period of time. The Court takes judicial notice that prejudgment interest is not available in all states, and postjudgment interest is a remedy available only after a claimant has brought his or her case to trial

-- sometimes on dockets with long delays. The Court finds that, under the circumstances, the Trust provides more value to members of the Global Health Claimant Class than they would receive in the tort system, even considering interest. Tr. at 1160.

259. This Court finds that the agreement by the Global Health Claimant Class to limit claims against the Trust to several liability is a fair exchange for the large and certain corpus of money the Global Settlement makes available to pay Global Health Claimant Class members. To the extent that Fibreboard's potential exposure under the principle of joint and several liability for damage caused by other asbestos manufacturers affected the historic settlement values of claims against Fibreboard, those values are reflected in the overall settlement amount and in the information the trustees can consider in evaluating claims. Tr. at 402.

C. Fibreboard's Contributions to the Settlement and the Insurers' Insistence on "Total Peace"

260. This Court finds that it is entirely fair and reasonable for Fibreboard to have insisted throughout the course of negotiations as an absolute precondition to reaching a global settlement -- that any such settlement be effected without Fibreboard contributing its non-insurance assets (except in the event the Coverage Case appeal went forward and Fibreboard lost that appeal). This Court further finds that Plaintiffs' Counsel acted reasonably in acceding to this precondition. The Court also finds that it was also entirely fair and reasonable for the Insurers to have made as an equally absolute precondition that this settlement provide them with "total peace," and for

Plaintiffs' Counsel to have acceded to that precondition. As previously found, Findings of Fact ¶¶ 125, 129, 255-259, these preconditions were not only essential to reaching an agreement that provides the Global Health Claimant Class with enormous benefits, they work no real detriment to the class.

261. On April 9, 1993, well before the parties had any reason for confidence about the prospects for reaching a global settlement, Continental bound itself to seek to achieve a global settlement that would be paid solely through Fibreboard's insurance resources. The Court finds that, as a direct consequence of the April 9 Agreement, the Global Health Claimant Class received at least an additional $200 million, a sum roughly approximating Fibreboard's corporate worth. That sum was paid on Fibreboard's behalf. Tr. at 1447-50. The Court finds that this contribution was made by the Insurers late in the negotiations, and that it was instrumental in bringing the negotiations to a close.

262. The Court finds, further, that Fibreboard's contribution to the Global Settlement included the skillful conduct of bitterly contested insurance coverage and ancillary litigation, an effort that converted a unique and potentially limited insurance asset into a settlement fund that is many times larger than Fibreboard's entire net worth, and which even provides compensation for otherwise uninsured claims. Fibreboard's efforts to reach a resolution of its asbestos-related liabilities within insurance resources entailed substantial risks to Fibreboard, including the incurring of debt much greater than Fibreboard's net worth, the risk of the assignment litigation, the relinquishing of all of Fibreboard's leverage in the April 9 Agreement in return for Continental's agreement to use its "best

efforts" to accomplish a global settlement within Fibreboard's insurance resources, and acceptance of the Trilateral Settlement as a back-up to the Global Settlement. Finding of Fact ¶¶ 75-82, 91, 128-131, 177. Taking these steps put Fibreboard's corporate existence in jeopardy, and made it reasonable for Fibreboard to insist, in return, that this settlement be funded soley by insurance funds. Tr. at 1163-65.

263. The Court finds that Fibreboard made other valuable contributions to the Global Settlement as well, including, e.g., an undertaking to provide case processing services to the Trust and an assignment of existing contribution claims to the Trust. Findings of Fact ¶ !80.

264. The Court further finds that the factual predicate for putting Fibreboard into an involuntary bankruptcy proceeding pursuant to Section 303 of the Bankruptcy Code of 1986 i.e., that there exist at least three creditors that have claims that are due and unpaid and are in the aggregate unsecured to the extent of at least $5,000 could not be satisfied, either now or at any time during the negotiations that led to this settlement. Fibreboard has at all times carefully structured its settlements, for example, so that payments were not presently due on them, and was paying their other creditors in a timely fashion. Tr. at 1536-37. The Court finds that Fibreboard made a prudent business judgment when it determined not to seek bankruptcy protection as a means of resolving its asbestos-related liabilities. Tr. at 276-78.

265. Based on the credible evidence, including the testimony of an investment banker,[29] the Court finds that a financially prudent buyer would not pay more than approximately $237 million to acquire Fibreboard free of all of its personal injury asbestos liabilities. The costs to Fibreboard of such a transaction would be at least $2 million, leaving a maximum net acquisition value ("Sale Value") of $235 million. Tr. at 247-49, 262, 272. Fibreboard's Sale Value, which far exceeds its current stock market value, fully takes account of the company's future prospects and the above-book values inherent in its timber assets. There is no basis for the Court to find that Fibreboard will ever be worth more in the future, in current dollars, than it is today. Tr. at 269-72, 282-84.

266. Counsel for the Ortiz intervenors asserted that this valuation was too low by $40 million to $50 million. Tr. at 294. Although there was no credible evidence to support this assertion, a difference in value of that order of magnitude would be irrelevant to the issues before the Court because, even if true, the company's asbestos liabilities, including more than $1 billion of liquidated settlement debt as of August 1993, nevertheless dwarfed the company's assets. Tr. at 486-87; Fibreboard Exh. 919 (Chart 3).

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[29]The Insurers presented the testimony of Richard Clark Abbott, an investment banker. Mr. Abbott is the managing director of Riverway Capital Partners, in Houston, a partnership that focuses on financial advice and investment. For 13 years, Mr. Abbott worked for the international investment banking firm of Morgan Stanley. Mr. Abbott is an expert in corporate finance and mergers and acquisitions, with extensive experience in valuing companies for the purpose of rendering fairness opinions and in advising and managing financially troubled corporations. Tr. at 242-46, 275-76; Continental Exh. 1. He is experienced in advising and raising money for a broad range of corporations, including forest product companies. Tr. at 243.

267. The Court finds that the sources and components of the settlement fund before the Court are factually irrelevant to assessing the fairness of the Global Settlement, but that -- in any event Fibreboard's contribution was both substantial and essential to achieving the result before the Court.

268. The Court also finds that it was entirely reasonable for the Insurers to have insisted that their enormous corporate contributions to this settlement obtain repose for them, and for Plaintiffs' Counsel to have acceded to this requirement. Certainty the ability to calculate their losses and to know that they will pay for this settlement is the principal benefit the Insurers obtain from this settlement. Tr. at 923, 1490-92, 1570, 1604.

D. Changed Circumstances

269. In view of the parties' expectation that the Coverage Case would in any event progress in the California courts without them, thereby changing the circumstances that existed on August 27, 1993, the Global Settlement Agreement specified that the fairness of the Global Settlement is to be viewed as of August 27, 1993, the date on which the agreement in principle was reached. Fibreboard Exh. 912 (Global Settlement Agreement) at § 8.7. The Court is of the view that the appropriate time to view the fairness and adequacy of the Global Settlement is as of August 27, 1993, and the Court has done so herein. Since the conclusion of the Global Settlement agreement in principle of August 27, 1993, significant litigation developments have occurred, however, that had they occurred prior to the conclusion of a settlement could have significantly altered the negotiating landscape. Moreover, these events would

likely have a substantial impact on the behavior of the Settling Parties should the Global Settlement fail to receive final court approval. Accordingly, even if the Court were to assess the fairness of the Global Settlement as of today, these developments provide further compelling evidence that the Global Settlement is fair and should be approved.

270. First, on January 27, 1994, petitions for review of the California Court of Appeal's decision in the Coverage Case were granted by the California Supreme Court on a "grant and hold" basis, the effect of which is that the appeal is presently held in abeyance while the California Supreme Court considers issues in other pending appeals that may be dispositive of issues in the Coverage Case. Fibreboard Exh. 259. Findings of Fact ¶ 47. On July 5, 1995, the California Supreme Court determined that a continuous trigger applies in third-party general liability policies. The court noted the similarity of the trigger issue in the Coverage Case, but deemed it appropriate, given the unique nature of asbestos litigation, that trigger of coverage questions specifically involving asbestos claims be left for decision on an appropriate record in a case in which they are squarely presented. See Montrose Chemical Corp. of California v. Admiral Ins. Co., 1995 WL 389860 at n. 16, _ Cal. Rptr. 2d_, _n. 16 (1995).

271. Second, on October 19, 1994, the California Court of Appeal reversed the decision of the Alameda County Superior Court in the Andrus case, and held that Fibreboard did not have the right to enter into assignment settlement agreements. Tr. at 207; Fibreboard Exh. 336. Fibreboard petitioned the California Supreme Court for review of the Court of Appeal's decision in Andrus, and, on January 4,

1995, the California Supreme Court denied that petition for review. Accordingly, the Court of Appeal's reversal of the trial court decision in Andrus is now final. Tr. at 1515-16; Fibreboard Exh. 337.

272. The Montrose decision notwithstanding, this Court finds that it is doubtful whether Continental would have been willing to agree to a global settlement price of $1.525 billion had the California Supreme Court's grant of review in the Coverage Case and the reversal in Andrus taken place before the conclusion of global settlement negotiations. Tr. at 1518-19. Likewise, the Court finds that, in light of these changed circumstances, were the Global Settlement to fail to receive approval, there is substantial possibility that Continental would no longer be willing to pay $1.525 billion for this settlement. Tr. at 1518-19. Indeed, Continental's counsel indicated at the fairness hearing that were the Global and Trilateral Settlements to fail to obtain the necessary court approvals, Continental's position would be that the assignment settlements constituted a material breach of Fibreboard's insurance policy so as to relieve Continental of any obligations under that policy. Tr. at 1515-16, 1545. Fibreboard disputes both Continental's position in this regard, and -in view of the April 9 Agreement -Continental's right to assert such position.

E. Rule 23 (b)

273. The Court finds that the prosecution of separate actions by or against individual members of the Global Health Claimant Class or Global Third-Party Claimant Class would create a risk of inconsistent or varying adjudications with respect to individual members of each such class which would

establish incompatible standards of conduct for the parties opposing those classes.

274. The Court finds that the prosecution of separate actions by or against individual members of the Global Health Claimant Class or Global Third-Party Claimant Class would create a risk of adjudications with respect to individual members of each such class which would as a practical matter be dispositive of the interests of the other members of those classes not parties to the adjudications or substantially impair or impede their ability to protect their interests.

275. The Court finds that the parties opposing the Global Health Claimant Class, Global Third-Party Claimant Class and the Longshore Defendant Class have acted or refused to act on grounds generally applicable to each of those classes, thereby making appropriate final injunctive or corresponding declaratory relief with respect to the classes as a whole.

X. THE CLASSES AND CLASS REPRESENTATIVES

A. The Classes

276. The Court adopts and incorporates herein the definitions of the Global Health Claimant Class and the Global Third-Party Claimant Class as set forth in the Court's Order Finally Certifying Plaintiff and Defendant Classes.

277. The Court adopts and incorporates herein the definition of the Longshore Defendant Class as set forth in the Court's Order Finally Certifying Longshore Defendant Class.

278. The Global Health Claimant Class contains in excess of 100,000 potential claimants. Tr. at 858, 1417. The Global Third-Party Claimant Class contains in excess of two thousand potential claimants. Continental Exh. 45 at 8, ¶ 14.

The Longshore Defendant Class contains at least several thousand members. Affidavit of Peter Van N. Lockwood, sworn to January 31, 1995 ("Lockwood Aff."), Dkt. No. 713, at ¶ 13. This Court finds that, as to each of these classes, the class is so numerous that joinder of all of its members is impracticable. This Court further finds that, as to each of these classes, there are questions of law or fact common to the class.

B. The Class Representatives

1. Global Health Claimant Class Representatives

279. Global Health Claimant Class representative Gerald J. Ahearn, Sr., resides in the state of South Carolina. Mr. Ahearn allege that he was exposed to asbestos-containing products, including products manufactured or supplied by Fibreboard, during the course of his employment at the Charleston Naval Shipyard in Charleston, South Carolina, during and after the 1940s. Mr. Ahearn has contracted asbestosis, which he alleges is the direct and proximate result of this asbestos exposure. Class Plaintiffs Exhs. 1009, 1024.

280. Global Health Claimant Class representative James R. Dennis resides in the state of South Carolina. Mr. Dennis alleges that he was exposed to asbestos-

containing products, including products manufactured or supplied by Fibreboard, during the course of his employment at Delta Air Lines from 1968 to 1970, and during his employment as a pipefitter in various shipyards in Charleston, South Carolina. Mr. Dennis has contracted asbestosis, which he alleges to be a direct and proximate result of that exposure. Class Plaintiffs Exhs. 1008, 1025.

281. Global Health Claimant Class representative Charles W. Jeep resides in the state of Missouri. Mr. Jeep alleges that he was exposed to asbestos-containing products during the course of his employment at the Puget Sound Naval Shipyard from 1944 to 1946. It is his current understanding that those product included products manufactured or supplied by Fibreboard. Mr. Jeep has contracted mesothelioma. Class Plaintiffs Exhs. 1008, 1026.

282. On September 4, 1993, Messrs. Ahearn, Dennis and Jeep each retained the Ness Motley firm to pursue any actions they might have for their asbestos-related diseases. On or about September 7, 1993, Messrs. Ahearn, Dennis and Jeep were contacted by Mr. Cox, who discussed with each of them that an agreement in principle had been reached with Fibreboard, Continental and Pacific, on or about August 27, 1993, to resolve Fibreboard's asbestos liabilities. After consultation with Mr. Cox, Messrs. Ahearn, Dennis and Jeep each agreed to serve as a class representative in a class action to be filed in this Court. Class Plaintiffs Exhs. 1024-1026; Tr. at 1169-70.

283. On or about December 21, 1993, Mr. Cox and Peter Lockwood (of Caplin & Drysdale) met with

Messrs. Ahearn, Dennis and Jeep to explain the proposed Global Settlement Agreement and to seek their authorization to sign the final documents detailing the Global Settlement. After full explanation, Messrs. Ahearn, Dennis and Jeep each authorized Messrs. Cox and Lockwood to sign the agreement on their behalf. Mr. Cox subsequently provided Messrs. Ahearn, Dennis and Jeep, on or about January 12, 1994, with copies of the Global Settlement Agreement, the Trust Agreement, the TDP, and the Glossary. Class Plaintiffs Exhs. 1024-1026; Tr. at 117071.

284. Messrs. Ahearn, Dennis and Jeep each believes that the Global Settlement is a fair settlement that will provide substantial benefits to persons injured by Fibreboard's asbestos-containing products. They each understand that, under the Global Settlement, they and the other class members cannot seek punitive damages or awards of more than $500,000 against the Trust. This does not change their belief that the settlement is fair. Messrs. Ahearn, Dennis and Jeep each understand that an agreement in principle had been reached to settle Fibreboard's liabilities to class members prior to the filing of this action. They have no objection to this procedure, and it does not change their belief that the settlement is fair. They each understand that there is a possibility that, under the settlement, payments to them or to other class members might be delayed under certain circumstances, and that the settlement provides that persons with more serious diseases, such as cancer, will be paid first if delays become necessary. This does not change their belief that the settlement is fair. Class Plaintiffs Exhs. 1024-1026.

285. Global Health Claimant Class representative William James Mitchell resides in the state of Kentucky. Mr. Mitchell was employed by Henderson Power & Light, in Henderson, Kentucky, between 1951 and 1987. During that time, Mr. Mitchell alleges that he was exposed to asbestoscontaining products (including pipe covering, block, cement and other products) as a boiler operator, lab operator, turbine operator, and as an assistant superintendent. Mr Mitchell believes hat he may have been exposed to asbestoscontaining products manufactured by Fibreboard. Mr. Mitchell is not presently aware of having any asbestos-related disease or condition. Class Plaintiffs Exhs. 1027.

286. On or about December 9, 1994, Mr. Mitchell spoke with P. Jay Cone, II, of the Ness Motley firm. Mr. Cone explained the instant class action to Mr. Mitchell, and Mr. Mitchell agreed to serve as class representative. Class Plaintiffs Exhs. 1027; Tr. at 1173.

287. Global Health Claimant Class representative James Ellison is a former employee of Bethlehem Steel Corporation who worked at the Bethlehem Shipyard in Port Arthur, Texas from 1955 to 1984. Mr. Ellison alleges that he was exposed to asbestos-containing products manufactured or distributed by Fibreboard, and that such exposure was the proximate cause of his lung cancer. He claims that he is entitled to damages from Fibreboard and to compensation under LHWCA from Bethlehem. Lockwood Aff. at ¶ 7.

288. In sum, the Global Health Claimant Class representatives hail from a variety of jurisdictions and represent a wide range of occupations, medical conditions and exposure

to Fibreboard asbestos. They are all members of the Global Health Claimant Class, and fairly reflect the relevant interests of the class. This Court finds that the Global Health Claimant Class representatives have fairly and adequately protected the interests of the Global Health Claimant Class. This Court further finds that the claims or defenses of the Global Health Claimant Class representatives are typical of the claims or defenses of the Global Health Claimant Class.

2. Global Third-Party Claimant Class Representatives

289. Owens-Illinois is well known to this Court, and to all judges experienced in asbestos litigation, as one of the most frequently sued asbestos defendants. OwensIllinois received between 17,000 and 20,000 asbestos personal injury claims per year between 1991 and 1993. Tr. at 2677. The company is, like Fibreboard, known in the asbestos litigation as a "pipe and boiler" defendant. Tr. at 168. It has been a member of the MDL Defense Steering Committee formed by Judge Weiner. Tr. at 403. Owens-Illinois has litigated many asbestos injury cases through trial and on appeal. Srite v. Owens-Illinois, Inc., 870 S.W.2d 556 (Tex. Ct. App. 1993), rev'd in part sub nom. Owens-Illinois, Inc. v. Estate of Burt, 897 S.W.2d 765 (Tex. 1995); Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633 (Md. 1992). It has considerable experience in dealing with settlement set-off and credit issues. Tr. at 1195.

290. Owens-Illinois took a strong position and objected vigorously to the Georgine settlement which, unlike the Third-Party Claimant Class Settlement here, did not protect

third-party credit and set-off concerns. Tr. at 1195. It took a similar position in protection of third-party interests in the Manville litigation. Tr. at 1513; In re Joint Eastern and Southern Districts Asbestos Litigation ("Manville"), 982 F.2d 721 (2d Cir. 1992), mod'd, 993 F.2d 7 (2d Cir. 1993). Fibreboard and Plaintiffs' Counsel met with Owens-Illinois representatives, and with others on the MDL Defense Steering Committee, to discuss and explain the operation of the Trust created by the Global Settlement. Tr. at 403, 1511-12.Owens-Illinois and other Steering Committee members expressed well-understood concerns (i) that all money paid by the Trust be available to Fibreboard's co-defendants where appropriate as credits and set-offs in the tort system; and (ii) that the set-off and credit calculation mechanism be fair. This was the first time in the history of the asbestos litigation that co-defendants had been invited to the bargaining table in a comparable situation. Tr. at 403.

291. This Court finds the Owens-Illinois has fairly and adequately protected the interests of the Global Third-Party Claimant Class. This Court further finds that Owens-Illinois' claims or defenses are typical of the claims or defenses of the Global Third-Party Claimant Class.

3. Longshore Defendant Class Representative

292. Bethlehem Steel Corporation is one of the largest industrial corporations in the United States, which, through its ownership and operation of shipyards, is regularly subject to claims by its employees for compensation under LHWCA. Those claims -- thousands of which have been filed

against Bethlehem -- include over 1,000 claims arising from asbestos-related diseases or deaths caused by exposure to asbestos-containing products (including products manufactured or distributed by Fibreboard) utilized by Bethlehem employees such as Global Health Claimant Class representative Ellison while working for Bethlehem. Bethlehem is a self-insured employer, and, as such, is for LHWCA purposes both an employer and an insurance carrier. Lockwood Aff. at ¶ 16; Affidavit of Donald S. Bauman, sworn to January 30, 1995 ("Bauman Aff."), Dkt. No. 712, at ¶¶ 4, 5; 33 U.S.C. §§ 902(5), 932(a)(2). This Court finds that Bethlehem has fairly and adequately protected the interests of the Longshore Defendant Class. This Court further finds that Bethlehem's claims or defenses are typical of the claims or defenses of the Longshore Defendant Class.

XI. ADEQUACY OF CLASS COUNSEL

A. Global Health Claimant Class Counsel

293. Messrs. Rice and Cox are partners with the Ness Motley firm, one of the leading U.S. law firms representing asbestos claimants. The Ness Motley firm has been involved in approximately 50% of all asbestos claims in the United States. Tr. at 1455. Mr. Kazan is a partner with the law firm Kazan, McClain, Edises & Simon. He has been involved in asbestos-related cases since the mid-1970s. The majority of his practice involves the representation of asbestos victims. Tr. at 899-901. Mr. Wartnick is a member of the law firm Wartnick, Chaber, Harowitz, Smith & Tigerman. Since 1981 his practice has been devoted primarily to representing asbestos claimants. Tr. at 642.

294. In considering with whom to negotiate a global settlement, Fibreboard and later, the Insurers and this Court took into account the prominence the Ness Motley firm and Messrs. Kazan and Wartnick had in the area of asbestos litigation. Tr. at 212-14, 1454-55. The Ness Motley firm was seen as necessary to any successful global settlement, in that the firm had been involved in most major litigations with Fibreboard since 1990, served as class counsel in Linscomb, was serving as co-lead counsel in the MDL proceedings, and Messrs. Motley and Rice had been serving as class counsel in Georgine. Accordingly, the Ness Motley firm had substantial credibility among the members of the plaintiffs' bar. Tr. at 212, 145455; Georgine, supra, 157 F.R.D. 246. Messrs. Kazan and Wartnick were Fibreboard's chief litigation adversaries on the West Coast, where Fibreboard is located and where it faced major liabilities. They were among the most knowledgeable counsel with respect to Fibreboard and were viewed as such by their colleagues. Tr. at 214, 1454.

295. Although during late Spring of 1993, when global settlement negotiations had stalled, Continental considered seeking to negotiate with other counsel for asbestos claimants, Continental concluded that Messrs. Rice, Cox, Kazan and Wartnick were the appropriate and necessary negotiating counsel. This conclusion was based on Ness Motley's degree of participation nationally in asbestos claims and the respect for that firm, the prominence of Messrs. Kazan and Wartnick on the West Coast and the degree of respect for their firms, and the fact that an attempt to recommence negotiations with other counsel would be viewed as an attempt to avoid the lawyers who were representing asbestos claimants' interests most aggressively. Tr. at 1456-57.

296. This Court has had extensive experience with, and knowledge of, Messrs. Rice, Cox and Kazan, and had been advised of Mr. Wartnick's historical involvement in prosecuting asbestos personal injury cases against Fibreboard, prior to August 9, 1993. This Court finds that Messrs. Rice, Cox, Kazan and Wartnick are prominent attorneys, highly respected for their knowledge, experience, skill and special competence in the field of asbestos litigation.[30] This Court further finds that Fibreboard chose to negotiate with these counsel -and this selection was ratified by the Insurers and this Court -based on their reputations, experience and extensive involvement in asbestos litigation. These characteristics of Plaintiffs' Counsel were what led this Court to formally appoint them as negotiating counsel for the Global Health Claimant Class. This Court finds that Plaintiffs' Counsel have provided adequate, professional and ethical representation to the Global Health Claimant Class.

297. Plaintiffs' Counsel have been well served by their retention of Caplin & Drysdale, who have advised them in areas outside their own expertise and worked side by side with them throughout the negotiations with Fibreboard and the Insurers. Tr. at 647, 1550. Caplin & Drysdale is widely recognized as a highly effective law firm, with expertise in a

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[30]Mr. Leonard Jaques, Esq., has asserted an objection to this settlement on the ground that "[c]ounsel for the named plaintiffs are not qualified to represent these Maritime Claimants in the specialized field of martitime law." Objections to Proposed Global Settlement by the Maritime Intervenors, Dkt. No 395 (Oct. 31, 1994), at 5. Mr. Jaques presented no evidence in support of this objection, and the Court finds that there is no such evidence in the record. Indeed, the evidence is to the contrary. Tr. at 1004-05. Accordingly, this objection is rejected.

broad range of complex areas. Tr. at 1556, 2127-28, 2345. In addition, Caplin & Drysdale, and particularly the principal lawyers involved in this case Messrs. Inselbuch and Lockwood have extensive experience in the field of asbestos litigation, although they have not represented individual health claimants. Tr. at 1556, 1772. Mr. Inselbuch represented the Asbestos Health Claimants Committee in the Manville bankruptcy from October 1985 through confirmation and consummation of the Manville Plan of Reorganization in 1988, and has represented the class of beneficiaries of the Manville trust in the restructuring litigation. See Kane v. JohnsManville Corp., 843 F.2d 636 (2d Cir. 1988) and Manville, supra, 982 F.2d 721 (2d Cir. 1992). The Court finds that Caplin & Drysdale is a highly experienced and qualified firm, whose participation in these negotiations materially benefitted the Global Health Claimant Class.

B. Global Third-Party Claimant Class Counsel

298. Owens-Illinois' counsel in this action, R. Bruce Shaw, of the law firm of Nelson, Mullins, Riley & Scarborough, and Richard L. Josephson, of the law firm of Baker & Botts, L.L.P., are among the best and most qualified attorneys representing defendants in asbestos-related litigation. Tr. at 1196. This Court finds that these counsel have provided adequate representation to the Global Third-Party Claimant Class.

C. Longshore Defendant Class Counsel

299. Bethlehem is represented before this Court by its Labor Counsel, Donald S. Bauman. Mr. Bauman

has responsibility at Bethlehem for, inter alia, LHWCA and workers' compensation matters, and is thus experienced in this area of the law. Bauman Aff. at ¶ 1. This Court finds that Mr. Bauman has provided adequate representation to the Longshore Defendant Class.

XII. ETHICAL CONSIDERATIONS

300. The Ortiz Intervenors raise two categories of objections with respect to Plaintiffs' Counsel that they assert implicate questions of legal ethics and professional responsibility.[31] First, the Ortiz Intervenors argue that Plaintiffs' Counsel had an impermissible conflict of interest arising out of their simultaneous representation of present and future asbestos claimants. Second, the Ortiz Intervenors argue that there were conflicts of interest within the Global Health Claimant Class -which this Court will label "intraclass" conflicts -which they initially argued required separate subclasses. Ortiz

[31]The Flanagan Intervenors have raised some of the same objections. Objections to Proposed Global Settlement By the Maritime Objectors, Dkt. No. 395 (Oct. 31, 1994). The Court's findings of fact and conclusions of law apply equally with respect to their objections. Mr. Jaques, counsel to the Flanagan Intervenors, has also asserted an additional argument regarding the ethical conduct of Plaintiffs' Counsel. Mr. Jaques asserts that the Settling Parties violated "ethical canons" by allegedly "arranging for the appointment of Class Counsel to 'represent' thousands of merchant mariners already known to have retained counsel . . . ." Id. at 4. The Court rejects this argument. This Court - and not the Settling Parties -was responsible for the appointment of Plaintiffs' Counsel to represent the Global Health Claimant Class. Moreover, Judge Weiner has specifically rejected Mr. Jaques's argument that he in fact has been appointed to represent all Maritime Claimants in the MDL 875 action. Order, Georgine, supra (Feb. 24, 1994).

Intervenors' Amended Objections, Dkt. No. 464 (Nov. 26, 1994). At the fairness hearing, however, the Ortiz Intervenors -through the testimony of their ethics expert -appeared to retreat from their position that subclasses were needed, and asserted that the varying interests of the future class members required instead that there should have been lawyers representing all of the individual interests during the negotiation of the settlement. Tr. at 1886-88. The Ortiz Intervenors assert that the presence of these alleged conflicts requires the Court to reject the Ahearn settlement for lack of adequate representation of the Global Health Claimant Class.

301. The Ortiz Intervenors offered Professor John Leubsdorf as an expert witness on these issues. Professor Leubsdorf is a law professor at Rutgers University Law School, and has taught courses in civil procedure and legal professional responsibility. He is a co-author with Professor Geoffrey Hazard of a textbook on civil procedure, and is one of two associate reporters for the American Law Institute's Restatement of the Law Governing Lawyers. Tr. at 1749-50; Ortiz Exh. 12. Although this Court finds that Professor Leubsdorf qualifies as an expert on issues of legal ethics and professional responsibility, it notes that he has had no asbestos litigation experience and has never testified or been consulted or retained as an expert or as counsel in any matter involving mass torts or asbestos litigation.[32] Tr. at 179192; Ortiz Exh. 12.

[32]Professor Leubsdorf was the primary author of an amicus brief submitted by 25 law professors in Georgine. However, the Georgine court did not accept the amicus brief, on the ground that its proponents "have only limited knowledge of the underlying facts and issues before the Court." Order, Georgine, supra (April 11, 1994); Tr. at 1791-92.

302. In response, the Settling Parties assert (i) that there was no material limitation on the representation of the Global Health Claimant Class by Plaintiffs' Counsel created by the concurrent representation of present and future claimants; (ii) that Plaintiffs' Counsel reasonably believed that the representation of the Global Health Claimant Class would not be adversely affected; and (iii) that the Court, in approving this settlement on a full record and after close scrutiny, supplied any consent that might have been required on behalf of the absent class members. The Settling Parties further assert that there were no antagonistic interests within the Global Health Claimant Class that would require either subclasses or the separate representatives recommended by Professor Leubsdorf at the fairness hearing. Tr. at 23!642.

303. In support of their views, the Settling Parties introduced the expert testimony of Professor Geoffrey Hazard, a nationally recognized scholar in the field of legal ethics and professional responsibility. Professor Hazard is a law professor at the University of Pennsylvania Law School, and is the Director of the American Law Institute. For many years, Professor Hazard taught primarily at Yale Law School in the fields of professional responsibility, legal ethics and civil procedure. Pacific Exh. 3. He is the primary author of The Legal Profession: Responsibility and Regulation and The Law and Ethics of Lawyering, and has authored over one hundred articles, many of which address issues of legal ethics and professional responsibility. Pacific Exh. 3.

304. Professor Hazard was a member of the Rand Civil Justice Institute advisory council for studies concerning asbestos litigation, and is currently an emeritus

member of the Rand Institute. He was the Reporter to the Kutak Commission, the body responsible for the preparation of the ABA Model Rules of Professional Conduct. Pacific Exh. 3; Tr. at 2307-12. Moreover, Professor Hazard has extensive experience as a consultant in the fields of professional responsibility and legal ethics, and has previously testified with respect to similar ethics issues in Georgine, where he was recognized as a competent expert whose opinions were accepted by Judge Reed in his decision in that case. Georgine, supra, 157 F.R.D. at 297. In light of Professor Hazard's extensive experience, training, education and knowledge of issues in this field of expertise, this Court finds he is a competent expert with respect to the issues on which he proffered his opinion in the case.

305. This Court arrived at its findings of fact regarding the ethics issues presented in this action based on a full review of the extensive record developed at the fairness hearing, including both the testimonial and documentary evidence presented. The Court has also heard the views of the Guardian Ad Litem for the Global Health Claimant Class, and read his report on these subjects. After careful consideration of the entire record, and particularly the testimony of both ethics experts and that of the negotiators themselves, this Court credits Professor Hazard's testimony as wholly persuasive and consistent with existing federal legal principles and the underlying facts of this case. This Court rejects the opinions and conclusions of Professor Leubsdorf for the following reasons: (i) his testimony reflects a lack of consideration of relevant testimonial and documentary evidence; (ii) in a number of areas the factual basis for his testimony is not supported by the record; (iii) his conclusions and recommendations are

speculative and in many cases impractical; (iv) in some areas his testimony lacks credibility or is contrary to settled federal law and ethical precepts; and (v) he lacks sufficient experience in mass torts and asbestos litigation. **A. Alleged Conflict of Interest**

Between Present and Future Claimants

306. The history of discussions and negotiations between various parties in this case is extremely complex, spanning a period of almost three years. Accordingly, the Court adopts the logical approach used by Professor Hazard of analyzing whether the conduct of Messrs. Rice, Cox, Kazan and Wartnick comported with the relevant ethical standards by examining that conduct in the context of five discrete time periods: (i) early 1991 until April 9, 1993; (ii) April 9, 1993 until August 9, 1993; (iii) August 9, 1993 until August 27, 1993; (iv) August 27, 1993 until October 12, 1993; and (v) October 12, 1993 until December 23, 1993.

307. Professor Hazard testified, and this Court finds, that at no time during any of these five relevant periods of settlement discussions and negotiations did Plaintiffs' Counsel have a conflict of interest between their present clients and the class of future claimants that materially limited their responsibilities to the future claimant class. Tr. at 2340. The Court notes that Professor Hazard, in rendering his opinion, relied on the rules of professional conduct as adopted in various jurisdictions (specifically, Model rules of Professional conduct 1.7(b) and 1.8), as well as the decisional law. Tr. at 2313-14. Professor Leubsdorf agreed that these were the appropriate authorities upon which to rely. Tr. at 1764, 1805.

308. In addition, the record clearly reflects that the global settlement negotiations actually contemplated a settlement of both present and future claims not only up to and following the April 9 Agreement, but until the parties' meeting with Judge Higginbotham on July 13, 1993 (at which time Judge Higginbotham stated his view that the parties should focus on achieving a global settlement with respect to future claims only). Tr. at 1399-1400. Indeed, the April 9 Agreement by its terms contemplated a global settlement of both present and future claims. Fibreboard Exh. 908 at ¶ 2. And, even after the meeting with Judge Higginbotham, the scope of the negotiations remained in flux, with the parties in fact considering a settlement of both present and future claims (as occurred at the meetings in Dallas the week of August 9). It was not until August 22, 1993 in Philadelphia -only five days before the August 27 agreement in principle -that Plaintiffs' Counsel for quite legitimate reasons rejected a combined global settlement of present and future claims, and absolutely stated that they would only do a global deal with respect to future claims. Tr. at 325, 1426-27. Findings of Fact ¶ 170. At that late date, this Court finds that it would have been unreasonable and contrary to the interests of the Global Health Claimant Class for Plaintiffs' Counsel to leave the field.

309. This Court finds that the record is devoid of any credible evidence that, at any time during the relevant periods of discussions and negotiations, Fibreboard or the Insurers conditioned the settlement of Plaintiffs' Counsel's present cases on an agreement from Plaintiffs' Counsel to enter into a global settlement. This Court further finds that -- as Professor Leubsdorf himself acknowledged, Tr. at 1816-17 -- the instant record is devoid of any evidence that the Global

Settlement was the result of any collusive or fraudulent conduct. The Global Settlement was not the result of collusive or fraudulent conduct on the part of the parties thereto.

1. Time Period (i):
Early 1991 Through April 9, 1993

310. A full description of the relevant events that transpired during the period of time beginning in early 1991 through April 9, 1993 is set forth in Findings of Fact ¶¶ 91-132.

311. Professor Hazard testified, and this Court finds based on the credible evidence, that during these early discussions none of Plaintiffs' Counsel engaged in any conduct with respect to what subsequently became know as the Global Health Claimant Class that violated any rule of ethics. Tr. at 2315-16.

312. As Professor Hazard noted, during this period of discussions concerning the possibility of an assignmentbased global settlement of present and future claims "there was . . . no identified class" -i.e., no actual client - and thus no attorney-client relationship between Plaintiffs' Counsel and what subsequently became the Global Health Claimant Class. Tr. at 2316-17. Specifically, Professor Hazard testified, and this Court finds, that there was no conflict of interest during this time period with respect to Plaintiffs' Counsel's representation of their present clients and their conduct with respect to the subsequent class of future claimants, given the lack of an attorney-client relationship between Plaintiffs' Counsel and the as yet unidentified future claimant class. Tr. at 2317. Moreover, this Court agrees with Professor Hazard in

finding that the record contains no credible evidence that during this period any of Plaintiffs' Counsel "did anything that was in any way adverse or constrained as far as the interests" of the subsequent future class members were concerned, or were in any way impaired with respect to their representation of the incipient future class by their "continuing responsibilities to . . . what are now called the presents." Tr. at 2317.

2. Time Period (ii):
April 9, 1993 Through August 9, 1993

313. A full description of the relevant events that transpired during the period of time from April 9, 1993 through August 9, 1993 is set forth in Findings of Fact ¶¶ 133-153.

314. The credible evidence in the record demonstrates that -with respect to the period of time from April 9, 1993, when Continental and Fibreboard executed the April 9 Agreement, until August 9, 1993, the date on which this Court appointed Plaintiffs' Counsel as negotiating counsel --Plaintiffs' Counsel's conduct toward the potential future claimants was, as phrased by Professor Hazard, "in conformity with ethical requirements." Tr. at 2318. In reaching this finding, this Court accepts Professor Hazard's conclusion that, although Plaintiffs' Counsel had not yet established an attorney-client relationship with the future claimants during this time period, they had nevertheless assumed a fiduciary responsibility toward them because Judge Higginbotham, acting as Settlement Facilitator, had, on July 13, 1993, focused the settlement discussions in such a way that a sharper definition of a possible class of future

claimants had begun to emerge. Tr. at 2319-20; Findings of Fact ¶ 147.

315. This Court further finds that even assuming Plaintiffs' Counsel had an attorney-client relationship with the incipient future class during this time, their conduct still conformed to the standards of professional ethics. As Professor Hazard noted, it would have been entirely proper for a plaintiffs' lawyer to represent more than one client against a defendant without such representation creating a conflict of interest. Tr. at 2320-21. The credible evidence further reflects, and this Court thus finds, that during this period of time there was no competition between present and future claimants for insurance funds. Tr. at 1557-58. Specifically, the record does not support the assumption underlying Professor Leubsdorf's opinion that a conflict existed -- that claimants were competitors in a zero sum game -- and that as a result Plaintiffs' Counsel were forced to favor the interests of one group over the other. No party to these negotiations testified, and no document supports the assertion that Plaintiffs' Counsel viewed the present and future claimants as other than multiple clients for whom Plaintiffs' Counsel exercised zealous representation. Indeed, the evidence is to the contrary. Tr. at 1557-58.

316. The Court agrees with Professor Hazard that the possibility of a no-coverage decision in the Coverage Case appeal presented a significant risk to the present and future claimants alike. Tr. at 792-93, 1056-57, 2321-23. The Court also finds that present and future claimants were facing a further risk of impairment due to the litigation between Continental and Fibreboard with respect to the validity of certain assignments of insurance policy benefits. Tr. at 1162-65, 1514-

17, 2323-24. These uncertainties -- which gave present and future claimants alike a substantial interest in a global resolution of the Coverage Case -- were properly taken into account by Plaintiffs' Counsel. Tr. at 2321-24.

317. This Court's decision on August 9, 1993 to follow the recommendation of Judge Higginbotham[33] and appoint Messrs. Rice, Cox, Kazan and Wartnick to negotiate the prospect of a Rule 23(b)(1)(B) settlement class composed of future claimants was based on the reputation, skill, knowledge, past and present representation of asbestos claimants, and extensive experience of these four attorneys in asbestos litigation. Findings of Fact ¶¶ 293-296. Furthermore, the context in which this Court appointed Plaintiffs' Counsel was framed by the Court's knowledge and understanding of the impending risk of the Coverage Case appeal, Findings of Fact ¶¶ 36-47; the existence and terms of the Substitute Ness Motley Agreement, Findings of Fact ¶¶ 151-153; and the history of the relationships among the parties, Findings of Fact ¶¶ 89-158. In light of the requirements of Rule 23 as well as the added significance of these aforementioned factors, it was crucial for this Court to appoint asbestos attorneys who were experienced, knowledgeable, skilled and credible in view of the extremely short window of opportunity to negotiate a global settlement, and the very high risk to future claimants presented by the Coverage Case appeal.

318. This Court fully credits Professor Hazard's testimony that it was essential for this Court on

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[33]Letter of Judge Higginbotham dated August 5, 1993 (Fibreboard Exh. 586)

August 9, 1993 to appoint attorneys who had experience, knowledge and "established competence and standing" in asbestos litigation to negotiate on behalf of the potential class of future claimants. Tr. at 2330. As Professor Hazard observed, asbestos litigation is and "extremely complex subject that takes intensive engagement to . . . understand and appreciate." Id. This Court finds that if this Court had appointed attorneys who did not have extensive background in asbestos litigation, it would have been an "invitation for bitter sort of criticism" and would have "jeopardiz[ed] any effort at serious negotiations." Tr. at 2330-31; Class Plaintiffs Exh. 1014 at 89-90; Class Plaintiffs Exh. 1023 at 14-15. In addition, this Court finds that the appointment of counsel inexperienced in asbestos litigation would have resulted in a less favorable settlement for the Global Health Claimant Class than the settlement that was in fact reached. Tr. 411-13, 1474-77.

319. Having fully considered all the evidence, this Court rejects Professor Leubsdorf's view that the following "practical alternatives" existed for the elimination or avoidance of what he viewed as conflicts of interest: (i) in 1991, Plaintiffs' Counsel (or some other set of plaintiffs' attorneys) could have settled their present cases with Fibreboard for cash, and agreed not to represent any additional present claimants until a global settlement agreement was executed, Tr. at 1918-19; or (ii) in August 1993, this Court could have appointed attorneys without asbestos experience because it is "quite possible that lawyers who had never actually litigated an asbestos case in the courtroom would nevertheless have a great deal of knowledge that would be relevant and very helpful in . . . settling this case." Tr. at 1770-72.

320. The Court rejects this testimony, as the evidentiary record does not support a conclusion that these were practical or even realistic alternatives. First, since at least 1991 Fibreboard had not settled any of its asbestos-related personal injury cases on an all-cash basis, but had instead entered into a number of assignment settlements that contained "back-end" provisions. Findings of Fact ¶¶ 75-88; Tr. at 191-92. Selecting certain counsel to negotiate a global settlement by paying those counsel entirely in cash to settle their present cases would, at the very least, create an appearance of impropriety and a wellspring of opposition from other claimants' counsel whose clients had not been as favorably treated. In addition, had Fibreboard insisted that Plaintiffs' Counsel settle their present cases and agree not to represent additional present claimants, such an agreement would have constituted a violation of ethical rules. See Model Rule of Professional Conduct 5.6(b).

321. Moreover, given the fact that most, if not all, of the assignment settlements made by Fibreboard since 1991 had a "most favored nations" clause in them, see, e.g., Continental Exh. 14, an all-cash settlement by Fibreboard with any individual claimant would likely have triggered that clause in the assignment settlement agreements, thereby requiring Fibreboard immediately to pay those settlements in cash. The dollar amount of those settlements far exceeded Fibreboard's net worth, and it would have been impossible for Fibreboard to have made such payments. Tr. at 168-69, 231; Continental Exh. 14; Fibreboard Exhs. 700-709. Accordingly, Fibreboard could not as a practical matter negotiate a global settlement with supposedly "conflict-free" lawyers who had settled their present cases on an all-cash basis.

322. Second, Professor Leubsdorf himself acknowledged, and this Court finds, that the appointment of any attorneys other than Plaintiffs' Counsel on August 9, 1993 would have created delay in the settlement process, as less experienced lawyers would have been unlikely to have negotiated a global settlement within the eighteen days between August 9 and August 27, 1993. Tr. at 1853. Moreover, as this Court has already found, it was not definitively decided that the global settlement being negotiated would consist solely of future claims until August 22, 1993. Findings of Fact ¶ 170.

323. Based on a review of the entire record, this Court finds that the appointment of less competent or less experienced attorneys would have subjected the Global Health Claimant Class to a substantial and potentially devastating risk that no settlement could be reached before an appellate decision was rendered in the Coverage Case, which could have occurred as early as August 27, 1993. The Court finds further that had negotiation by other, less experienced, attorneys resulted in a global settlement by August 27, in light of the circumstances of the case and the particular positions of the parties, such settlement would have been substantially less advantageous for the future claimant class. Tr. at 411-13, 1474-77, 2787.

324. Accordingly, this Court finds that there were no practical alternatives available with respect to the appointment of class counsel under the specific circumstances of this case. This Court further finds that this Court's appointment of Plaintiffs' Counsel as negotiating counsel on August 9, 1993, did not materially change or augment the fiduciary duties already owed to the future claimants by plaintiffs' counsel. Tr. at 2333.

3. Time Period (iii)
August 9, 1993 Through August 27, 1993

325. A full description of the relevant events that transpired during the period of time from August 9, 1993 through August 27, 1993 is set forth in Findings of Fact ¶¶ 154-181.

326. This Court agrees with Professor Hazard's conclusion, and finds, that during the period of time from August 9, 1993 through August 27, 1993, Plaintiffs' Counsel did a highly effective job of negotiating on behalf of the incipient futures claimant class under the attendant circumstances. Tr. at 2336. The record is replete with evidence supporting this finding. Tr. at 1464-81; Findings of Fact ¶¶ 159-181. To the very end of the negotiating process, Plaintiffs' Counsel sought -and eventually obtained -substantial additional benefits for the Global Health Claimant Class, including an additional $35 million in compensation in the final hours of the negotiations. Findings of Fact ¶¶ 174.

327. Although Professor Leubsdorf stated his view that the trigger provisions for the contingent back-end payments in the Substitute Ness Motley Agreement gave rise to conflict of interest between the ness Motley settled claimants and the future claimants, Tr. at 1760-62, this Court instead credits Professor Hazard's convincing testimony that the Substitute Ness Motley Agreement -- including the back-end contingent payment feature of that agreement -- did not create an impermissible conflict of interest. Tr. at 2324-29. This Court finds that the interests of the future claimant class

members were synergistic and compatible with those of the present claimants whose claims were settled under the Substitute Ness Motley Agreement, given that any class settlement --which would act as a trigger for the Ness Motley back-end payments -would require court approval. Such an approval process requires a court to evaluate the fairness and reasonableness of the settlement, as well as the adequacy of the representation. Had Plaintiffs' Counsel attempted somehow to benefit their present clients by failing to negotiate zealously and diligently on behalf of the future class -thus failing to provide the class with adequate representation -they would have precluded judicial approval of the Global Settlement, thereby jeopardizing the possibility that the back-end payments would be triggered. Tr. at 2326-29. Moreover, at the time the Substitute Ness Motley Agreement was reached on August 5, 1993, the potential of a combined global settlement of both present and future claims continued to exist. Findings of Fact ¶¶ 151-170.

328. This Court finds that it was in the common interest of both the present Ness Motley claimants and the future class members that Plaintiffs' Counsel diligently and loyally negotiate the best possible global settlement on behalf of the future class, as it was in the interest of both groups to achieve a global settlement for the future class that would receive court approval. This Court finds further that it was in the common interest of both groups that a global settlement be reached prior August 27, 1993, due to the risk presented by the Coverage Case appeal. Findings of Fact ¶¶ 36-57. This common interest required Plaintiffs' Counsel to balance their efforts at negotiating for the last possible dollar that could be obtained for the future class, against the possibility that a global

settlement would not be reached and the Coverage Case appeal eventually decided in favor of the Insurers.

329. This Court finds that Plaintiffs' Counsel effectively used the threat posed to Continental by the Fibreboard v. Continental litigation in this Court, which sought to implement the Initial Ness Motley Agreement (and which itself provided for settlement values substantially higher than had historically been the case), to conclude the Substitute Ness Motley Agreement at settlement values that were higher than historical values. Plaintiffs' Counsel then used the higher-than-average Substitute Ness Motley Agreement values to achieve a global settlement for future claimants at similarly high values, effectively arguing they could not possibly accept less for a class of future claimants than they had just negotiated for their present clients. Tr. at 1538-40. Accordingly, this Court finds that settlement of the Ness Motley cases, occurring when and as it did, ultimately benefited the members of the Global Health Claimant Class.

330. This Court rejects any implication as factually unfounded that the Substitute Ness Motley Agreement was somehow part of a "tying arrangement" by which Messrs. Rice and Cox were "paid off" with an excessively rich settlement of their firm's cases at the expense of the future claimants. The credible evidence makes clear, and this Court finds, that (i) the Settling Parties jointly determined to settle the Ness Motley cases before focusing on a global settlement; (ii) Continental itself had independently reached the conclusion that a Ness Motley settlement was a necessary precondition to a global deal because of the litigation facing it seeking a Final 5.2 Order and the need to bring Pacific to the bargaining table, Findings of

Fact ¶¶ 149-150; and (iii) Judge Higginbotham indicated that in his view a global settlement should consist solely of future claimants. Findings of Fact ¶ 147.

331. This Court also finds, based on the extensive record established at the fairness hearing, that in reaching the Global Settlement agreement in principle announced in this Court on August 27, 1993, Plaintiffs' Counsel obtained the best possible settlement for the future class available at that time. The Court further finds that Plaintiffs' Counsel reasonably believed that the average claims values upon which they priced the Global Settlement were roughly equivalent to the average claims values inherent in the Substitute Ness Motley Agreement once the latter are discounted both for delay and risk of nonpayment. Tr. at 1155-58.

332. Mr. Robert Sweeney testified that he (i) did not take part in the global settlement negotiations in August; and (ii) moved this Court in September to be relieved of his position as negotiating counsel, due to his personal belief that he had a conflict of interest arising out of his representation of present clients and his duty toward the future claimant class. Tr. at 2434, 2437, 2452-53, 2464-66. However, on December 27, 1993, Mr. Sweeney wrote to this Court asking to be appointed as counsel to the Global Health Claimant Class. Tr. at 2446, 2466-70; Continental Exh. 55. Mr. Sweeney made this request despite the fact that he had not yet signed a settlement agreement with Fibreboard for his present cases. Tr. at 2437-38. This Court declined Mr. Sweeney's request, because the Global Settlement Agreement had already been negotiated to completion and executed on December 23, 1993. Mr. Sweeney has not objected to this settlement. Tr. 2442-43.

333. Mr. Sweeney is not an expert in the field of legal ethics and professional responsibility, nor did he assert at the fairness hearing that Plaintiffs' Counsel had violated any ethical precepts. To the contrary, he expressly declined to offer such a view. Tr. at 2431, 2479-80. Moreover, this Court does not find Mr. Sweeney's testimony to be persuasive even with respect to the issue of whether he believed that he faced a conflict of interest in negotiating a future claimant global settlement. For one thing, although Mr. Sweeney testified that he felt he could not act as negotiating counsel because he had not settled his present cases, he attended the negotiating sessions in both Philadelphia and Tyler during the week of August 23, 1993, apparently without ever voicing to the participants that he deemed himself to be operating under any such constraint. Tr. at 2687. Moreover, his testimony as to whether he advised this Court of any such reservation when he concededly accepted this Court's designation to serve was self-contradictory. Tr. at 2460-64. In any event, whatever Mr. Sweeney's views were with respect to the conflict issue, this Court finds there is no basis in the record to conclude that Plaintiffs' Counsel were in fact required to withdraw as counsel under the relevant ethical rules.

4. Time Period (iv): August 27, 1993 Through October 12, 1993

334. A full description of the relevant events that transpired during the period of time from August 27, 1993 through October 12, 1993 is set forth in Findings of Fact ¶¶ 182-186.

335. This Court finds that, during the period of time between August 27, 1993, when the Global Settlement agreement in principle was announced in open court, and October 12, 1993, the day on which the Trilateral Settlement Agreement was executed, Plaintiffs' Counsel conducted themselves in accordance with the relevant ethical principles and did not violate any rules of professional responsibility. Tr. at 2339. During this period of time, Plaintiffs' Counsel did not engage in any negotiations of the terms of the Global Settlement Agreement. Findings of Fact ¶¶ 181-187.

336. In its original Order designating Professor Green as Attorney Ad Litem, this Court expressly recognized that the role of Plaintiffs' Counsel in representing asbestos claimants other than those who are members of the Global Health Claimant Class could give rise to assertions of conflicts in connection with their representation of the class members. Pacific Exh. 2. This Court undertook to appoint Professor Green based, in part, upon this Court's determination that it was not feasible to require Plaintiffs' Counsel to have fully settled all of their present cases. Pacific Exh. 2. Professor Hazard testified that the appointment of Professor Green was a "very prudent, appropriate measure of additional scrutiny and concern for the interests of the claimants," Tr. at 2350, and Professor Leubsdorf acknowledged that this appointment provided additional protection to the Global Health Claimant Class. Tr. at 1879-80.

5. Time Period (v): <u>October 12, 1993 Through December 23, 1993</u>

337. A full description of the relevant events that transpired during the period of time from October 12, 1993 through December 23, 1993 is set forth in Findings of Fact ¶¶ 186-189.

338. With the execution of the Trilateral Settlement Agreement on October 12, 1993, Fibreboard and the Insurers had concluded a separate agreement that, if it received court approval, would trigger the back-end payments for Plaintiffs' Counsel's present clients whether or not a global settlement was ever finally documented and judicially approved. It was from this date until December 23, 1993, the date on which the Global Settlement Agreement was executed, that Plaintiffs' Counsel, Fibreboard and the Insurers negotiated the specific terms of what became the written Global Settlement Agreement, the Trust Agreement and the TDP. This Court agrees with Professor Hazard's conclusion that, during this period of time, Plaintiffs' Counsel's conduct did not result in a conflict of interest on their part, or otherwise violate any applicable ethical standards or rules. On the contrary, the credible evidence reflects that during this period of negotiations Plaintiffs' Counsel preformed in a "very professional way." Tr. at 2341-42.

6. Conflict of Interest: Concluding Findings

339. This Court finds that there was no material limitation on the representation of the Global Health Claimant Class by Plaintiffs' Counsel's concurrent representation of present and future claimants, and that Plaintiffs' Counsel at all times acted ethically and in accordance with their professional obligations. The Court finds further that Plaintiffs' Counsel reasonably believed in light of the circumstances, that their representation of the Global Health Claimant Class would not be adversely or materially affected by their representation of or duty to their other present and former clients. Indeed, the evidence clearly reflects, and the Court finds, that at all times negotiations among Plaintiffs' Counsel, Fibreboard and the Insurers were contentious, hard-fought and conducted in good faith at arm'slength. Findings of Fact ¶¶ 117-189. Professor Green reached the same conclusions, and noted that the negotiations were frequently marked by disagreements among the negotiating parties and among Plaintiffs' Counsel themselves. Tr. 2744.

340. A number of the discussions and negotiating sessions that led to the Global Settlement were conducted under the auspices of Judge Higginbotham, in his role as Settlement Facilitator, who kept this Court informed of the progress of negotiations throughout the Spring and Summer of 1993. Tr. at 1099-1101. Moreover, on August 26 and 27, 1993 this Court observed firsthand the contentious, arm's-length nature of the negotiations. Tr. at 1458-72. Accordingly, this Court finds that the record is devoid of any evidence that Plaintiffs' Counsel compromised the interests of the Global

Health Claimant Class members so as to benefit their other clients. Tr. at 1557-59.

341. The evidence reflects that circumstances have substantially changed since August 27, 1993, such that renegotiation of the Global Settlement by a different set of attorneys at this point in time would likely result in a settlement less favorable to the Global Health Claimant Class than the Global Settlement. Findings of Fact ¶¶ 269-272.

342. This Court finds that Messrs. Rice, Cox, Kazan and Wartnick adequately, professionally, and ethically represented the interests of the Global Health Claimant Class members. This Court further finds that at all times during the relevant periods of settlement discussions and negotiations, the conduct of Plaintiffs' Counsel fully comported with the applicable standards of legal ethics and professional responsibility. This Court further finds that the record is devoid of any evidence suggesting either that Plaintiffs' Counsel failed to represent zealously and loyally the interests of the Global Health Claimant Class members or otherwise compromised the interests of that class in order to benefit any other client or group of clients.

B. Alleged Intraclass Conflicts

343. The Ortiz Intervenors assert that intraclass conflicts exist between each of the following pairings of groups of Global Health Claimant Class members: (i) class members who were first exposed to asbestos-containing products prior to March 15, 1959, and those who were first exposed after that date; (ii) class members who have already

suffered a "cognizable" asbestos-related injury and those who have not yet suffered such an injury; and (iii) class members who will be individually represented in filing their claims against the Trust by Plaintiffs' Counsel (some of whow are also members of the Select Counsel for the Beneficiaries ("SCB")), and those class members whose individual attorneys are not members of the SCB. Ortiz Intervenors' Amended Objections, Dkt. No. 464 (Nov. 28, 1994); Tr. at 1778-87. The Ortiz Intervenors' expert, Professor Leubsdorf, acknowledged at the fairness hearing that separate subclasses consisting of these various groups are not required, but he asserted that separate counsel should have been appointed to negotiate on behalf of the various interests of Global Health Claimant Class members. Tr. at 1886-87.

344. In general, the Court finds the Professor Leubsdorf's testimony on these points lacks credibility. Professor Leubsdorf expressed the view that distinctions, often arbitrarily chosen, create conflicts that prevent ethical representation of a class even where the common interests shared by the class members vastly outweigh the distinctions among them, and the settlement fairly accommodates all interests. The Court takes judicial notice that, were this view to be correct, numerous settlements reflecting far more blatant distinctions among intraclass groups would necessarily have been the product of unethical conduct. See, e.g., Reed v. General Motors Corp., 703 F.2d 170 (5th Cir. 1983); Kincade v. General Tire & Rubber Co., 635 F.2d 501 (5th Cir. 1981); United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976). Indeed, were Professor Leubsdorf correct, new negotiating counsel would have to have been added and dropped from the team repeatedly throughout the negotiating process as Fibreboard and

the Insurers proposed and then withdrew proposals that might arguably (when viewed in hindsight) favor one subgroup over another.

345. Based on the credible evidence presented, this Court finds that there have been and continue to be no intraclass conflicts within the Global Health Claimant Class such that either subclassing or separate negotiating attorneys were or are now required. Moreover, this Court finds that the common interests of the class members far outweigh any differing interests that they may have.

346. The Court finds that the Global Health Claimant Class members share the following common interests: (i) avoiding the potentially disastrous results of a loss by Fibreboard in the Coverage Case appeal; (ii) maximizing the total settlement contribution from Fibreboard and the Insurers; (iii) streamlining the procedures for the filing, processing and resolution of claims, and thereby reducing transaction costs and delays in compensation; (iv) minimizing the percentage of their compensation diverted from them to pay attorney's fees; and (v) adopting procedures that provide for payments to claimants in an equitable manner.

1. Alleged Conflict Between Pre-1959 and Post-1959 Claimants

347. The Ortiz Intervenors' suggestion that the distinction between pre-1959 and post-1959 claimants creates an impermissible conflict for Plaintiffs' Counsel seeks to draw upon a historical vestige of Fibreboard's insurance dispute. Although there are many reasons why claims arising from earlier

exposure to Fibreboard's products tended to be of greater value (including the fact that those claimants generally had more extensive exposure to Fibreboard asbestos and suffered from more severe disease, and the fact that Fibreboard's liability to those claimants was shared among fewer solvent defendants, Findings of Fact ¶ 26), the pre-1959 versus post-1959 dividing line in actuality stems from the cutoff point in coverage under the Continental policy.

348. Before 1992, the lack of insurance coverage for post-1959 claims was a given, but not a disqualifying conflict. In the past, counsel representing individuals with claims against Fibreboard, including Plaintiffs' Counsel, have represented both claimants with pre-1959 claims and claimants with post-1959 claims. The Ortiz Intervenors do not maintain that this created an impermissible conflict. Leubsdorf Tr. at 1933.

349. Before the Settling Parties agreed upon how to treat pre and post-1959 claims in the Global Settlement, several events had vitiated any logic for perpetuating the preand post-1959 insurance-based distinction. First, the Pacific II Agreement had (contingent on subsequent rulings) provided for $330 million of insurance money for post-1959 claims (both existing and future). Fibreboard Exh. 905. Second, in the April 9 Agreement, Continental agreed to negotiate for a global settlement that would resolve all claims (preand post-1959), and also agreed to pay the amounts due under the Pacific II Agreement were a global settlement to be reached. Tr. at 311-12; Fibreboard Exh. 908. Third, consistent with the April 9 Agreement, on August 27, 1993 the parties agreed upon a settlement that Plaintiffs' Counsel believed to be sufficient to

pay fair value to claims irrespective of the date of exposure. Tr. at 1043-47. Fourth, on October 12, 1993, the Insurers and Fibreboard entered into the Trilateral Settlement that, subject to court approval, makes money available to Fibreboard irrespective of the date of exposure. Fibreboard Exh. 910. Finally, the decision as to how to divide the settlement among class members did not take place until the negotiation of the TDP, which occurred after October 12. Tr. at 1953.

350. Accordingly and reasonably, Plaintiffs' Counsel negotiated the Global Settlement so that future asbestos-related personal injury claimants would be compensated irrespective of whether their claims arose from pre- or post-1959 first exposure to asbestos. Tr. at 653.

351. The Court rejects Professor Leubsdorf's testimony as to the existence of an impermissible conflict of interest between pre-1959 and post-1959 claimants because: (i) he lacks experience in mass tort cases and asbestos litigation; (ii) as described in these Findings of Fact, the credible evidence in the record does not support his factual predicate; (iii) his conclusion is entirely speculative and without foundation; (iv) his interpretation of the ethical rules would lead to highly impractical results that would provide no benefit to Global Health Claimant Class members, and would instead force them unnecessarily to face substantial risks; and (v) his conclusion is not grounded upon, and is in fact inconsistent with, applicable law. Of particular note was Professor Leubsdorf's admission at the fairness hearing that -- in forming his opinion -- he had not read the Pacific II Agreement or the April 9 Agreement, both of which materially affect the question of whether separate

representation for pre-1959 and post-1959 claimants was required. Tr. at 1892.

352. The Settling Parties presented the expert testimony of Professor Hazard with respect to this issue. Professor Hazard testified that, in his expert opinion, which this Court credits and accepts, the concurrent representation of pre-1959 claimants and post-1959 claimants by Plaintiffs' Counsel did not present an impermissible conflict of interest. Tr. at 2342-45. Professor Hazard reasoned that before negotiations had begun, the Pacific II Agreement had rendered the interests of the pre-1959 and post-1959 claimants substantially similar, and that equality of treatment embodies a principle of fairness that would appeal to both groups. Tr. at 2344.

353. The Court accepts Professor Hazard's testimony that the concurrent representation of the pre-1959 and post1959 claimants by Plaintiffs' Counsel did not present an impermissible conflict which disabled Plaintiffs' Counsel, and finds his reasoning persuasive. This Court finds that the Pacific II Agreement, the April 9 Agreement and the Trilateral Settlement Agreement removed the potential for differential treatment of the pre-1959 and post-1959 claimants in the context of a global settlement. Tr. at 2342-45; Fibreboard Exhs. 905, 908, 910.

354. Based upon the testimony of Professor Hazard and the other credible evidence presented, this Court finds that Plaintiffs' Counsel were not ethically conflicted, and indeed acted vigorously, diligently, professionally and ethically in representing both pre-1959 and pre-1959 claimants.

2. Alleged Conflict Based on "Cognizability" of Injury

355. The Global Settlement Agreement provides, inter alia, that claimants will not be entitled to any payment from the Trust on account of claims for punitive damages, damages in excess of Fibreboard's actual share of responsibility, damages for increased risk of cancer, pre-judgment interest or post-judgment interest, and that total payments arising from one individual's exposure to asbestos shall not exceed $500,000. The Global Settlement Agreement also contains certain spendthrift provisions. Findings of Fact ¶¶ 200-202.

356. Class Counsel believed that the abovedescribed provisions would benefit the Global Health Claimant Class as a whole, because class members who do not suffer compensable injury until well into the future have an interest in provisions that increase the likelihood that funds will be available to pay their claims. Tr. at 914-15. Based on the record before it, the Court finds that this belief was well founded.

357. The Ortiz Intervenors argue that Plaintiffs' Counsel's concurrent representation of all future claimants created an impermissible conflict of interest on their part, where -according to the Ortiz Intervenors' expert -some of them have already suffered "legally cognizable" injury and some of them have not. Tr. at 1784. The Ortiz Intervenors offered Professor Leubsdorf as an expert witness on this issue.

358. As an initial matter, the Court observes that it has already found that all members of the Global Health Claimant Class have "legally cognizable" injuries in the sense that they all satisfy the requirements for subject matter jurisdiction. Findings of Fact ¶¶ 1-5. Accordingly, to the extent the Ortiz Intervenors intend in their objection to use "legally cognizable" in this sense, their objection is found to be meritless as it is based on a factual premise -that there are some class members without "legally cognizable" injuries -that this Court has already rejected. Hereafter the Court will address the Ortiz Intervenors' argument on this point on the assumption that by a "legally cognizable" injury what is in fact meant is a presently manifested asbestosrelated injury, such that a person with such an injury is -in the words of Professor Leubsdorf -"going to present their claims within a rather short time." Tr. at 1785.

359. Professor Leubsdorf testified that, in his opinion, the concurrent representation of these groups was inappropriate because, according to him, Global Health Claimant Class members who have already suffered a "legally cognizable" injury have an interest in securing recovery free of limits such as are imposed by the Global Settlement. At the same time, according to Professor Leubsdorf, Global Health Claimant Class members who have not already suffered "legally cognizable" injury have a conflicting interest in seeking such limits, in the hope of preserving funds available to pay their claims. Tr. at 1784-86.

360. The Settling Parties presented the expert testimony of Professor Hazard with respect to this issue. Professor Hazard testified that, in his expert opinion, Plaintiffs' Counsel's concurrent representation of future claimants who

had already suffered "legally cognizable" injury and those who had not did not present an impermissible conflict of interest. Professor Hazard reasoned the issue does not present a question of ethics or a conflict of interest. Tr. at 2348-49.

361. The Court accepts Professor Hazard's testimony that Plaintiffs' Counsel's concurrent representation of future claimants who had already suffered "legally cognizable" injury and those who had not did not present an impermissible conflict of interest that disabled Plaintiffs' Counsel. The Court finds the credible evidence reflects that (i) during the process of negotiations there was no competition for insurance funds between these two groups of claimants; (ii) all Global Health Claimant Class members had an equal interest in settling their claims and avoiding the risk of the Coverage Case appeal; and (iii) any demarcation between groups of class members based on the time an injury becomes "cognizable" or manifested is purely arbitrary. Tr. at 1888-89, 1923-25. Furthermore, this Court finds that the interest of the two subgroups at issue here coincide to a far greater extent than they diverge. For example, both subgroups equally share the risk of a loss of the Coverage Case that might result were no settlement to be reached, equally share the desire for a fair and equitable settlement, and equally share the interest in preserving funding for all class members.

362. Based on the credible evidence, this Court rejects Professor Leubsdorf's conclusion as to the existence of an impermissible conflict of interest between these groups of class members because: (i) he lacks practical experience in mass tort cases and asbestos litigation; (ii) his application of ethical rules leads to highly impractical results that provide no benefit to Settlement Class Members and instead

create substantial risks to Settlement Class Members; and (iii) his conclusion is not grounded upon and is in fact inconsistent with applicable law.

363. Based upon the testimony of Professor Hazard and the other credible evidence presented, this Court finds that Plaintiffs' Counsel did not have a conflict of interest, and indeed acted vigorously, diligently, professionally, and ethically in representing both the Global Health Claimant Class members who had already suffered a "legally cognizable" injury and those who had not.

3. Alleged Conflicts Relating to SCB

364. The Trust Agreement provides for a group of attorneys to serve as Select Counsel for the Beneficiaries ("SCB"). The duty of the SCB members is to represent the interests of the Global Health Claimant Class members consistent with the purposes of the Trust. As the Trust Agreement was originally written, Plaintiffs' Counsel (together with several other attorneys) were to serve as the initial SCB. The SCB duties specifically include giving prior approval (by a majority vote) on a variety of Trust matters, including amendment or waiver by the Trustees of certain provisions of the Trust Agreement or TDP, and the filling of vacancies in the Class A and Class B Trustee positions.

365. The Ortiz Intervenors argued that service on the SCB by asbestos lawyers representing claimants against the Trust presents an impermissible conflict of interest. They offered Professor Leubsdorf as an expert witness on this issue. Professor Leubsdorf testified that, in his opinion, there exists the

possibility that Global Health Claimant Class members individually represented by an SCB member might receive better treatment from the Trust than those class members who are not represented by SCB members, either because low-level employees of the trustees might give preferential treatment to class members represented by SCB members out of concern for their jobs, or because trustees of the Trust might "wink at" preferential treatment of the clients of the SCB members if they believed that unless they permitted such preferential treatment, the SCB members would not approve certain decisions that were necessary to accomplish the purposes of the Trust. Tr. at 1782-84.

366. Professor Hazard testified that the risk that SCB members will use their status as such to seek an unfair advantage for their individual clients at the expense of the other members of the Global Health Claimant Class is insignificant for the following reasons: (i) it is to be assumed that the trustees will honor their fiduciary responsibilities to the class; (ii) the continuing scrutiny of the claims handling process will deter misconduct; (iii) SCB members have little to gain and much to lose by engaging in illegal or improper conduct, and thus it is not in their interest to engage in any misconduct that would cast doubt on the legitimacy of either their role as SCB members or as attorneys for individual claimants; and (iv) this Court has continuing jurisdiction over this action, and will be receiving an annual accounting of Trust-related activities that will be publicly available such that persons who believe the trustees are acting in any way contrary to the interests of the beneficiaries may bring those facts to the attention of this Court. Tr. at 2346-47.

367. This Court in a Memorandum to the Parties of March 30, 1995 expressed the view that the Global Health Claimant Class would be better served by an SCB that avoided even the appearance of impropriety, although the negotiations of the SCB provision did not undermine Plaintiffs' Counsel's ability to represent the Class fairly and adequately, and Plaintiffs' Counsel did not advocate those provisions during negotiations based on self-interest or other inappropriate motive. The Court expressed reservations, consistent with concerns of the Guardian Ad Litem, about provisions of the original Trust Agreement that required unanimous concurrence of all other SCB members to remove a member, that permitted SCB members to serve until they die, resign, or are removed, that gave SCB members the power to select their replacements, and that allowed SCB members both to represent claimants before the Trust and to seek removal of trustees and select replacement trustees. The Court advised that it had decided to withhold approval at that time, invited the settling parties to consider amending the SCB provisions, and suggested procedures for the Settling Parties to consider.

368. The Settling Parties entered into a "Third Amendment to Global Settlement Agreement" ("Third Amendment") as of May 15, 1995. The Third Amendment changed the SCB provisions to address the Court's concerns. One, the composition, terms of service, removal, and replacement provisions have been changed. As amended, the SCB consists of five lawyers. The Class A member will be a representative of organized labor. The Class B and C members will be individuals who do not represent individual plaintiffs in asbestos personal injury litigation. The Class D and E members will be lawyers with experience representing plaintiffs with

experience representing plaintiffs in asbestos personal injury litigation, including those with Interim Claims before the Trust. Initial terms are two years for the Class A member, four years for the Class B and C members, and five years for the Class D and E members. Thereafter, each SCB member serves a five-year term. Any SCB member may be removed by the Court on application of any other member, any trustee or any trustor. Vacancies in the Class A position will be filled by the AFL/CIO. Vacancies in the Class B, C, D and E positions will be filled by votes of law firms that have liquidated claims with the trust during the preceding two fiscal years, with one vote per $100,000 in aggregate liquidated amount of claims. The Class D and E members will come respectively from the western and eastern halves of the United States and will be elected, separately, by law firms with their principle places of business in the area from which they come. Two, only Class D and E members may represent beneficiaries before the Trust, and only Class A, B and C members may vote on removal or appointment of trustees.

369. The provisions adopted by the Third Amendment regarding SCB members satisfy the Court's concerns. The Guardian Ad Litem has advised that the provisions are a wise and appropriate response to the concerns that he and the Court raised, and that he supports the Third Amendment and recommends approval of the Global Settlement, as amended. These provisions were the subject of notice, and a hearing was held on June 20, 1995. No intervenor objected to them, and the Court received no other objection of substance. The Court finds that the SCB provisions, as amended, avoid even the appearance of impropriety, and remove the possibilities that some future SCB member may use

his or her powers to gain an unwarranted advantage for claimants whom he or she represents, or that such undue influence may impugn the reputation or integrity of the Trust.

C. This Court's Consent

370. Even if this Court were to find -- which it does not -- that Plaintiffs' Counsel's representation of the Global Health Claimant Class was such that it may have been materially limited by their other responsibilities, this Court finds that the representation was ethical because (i) Plaintiffs' Counsel reasonably believed that the representation was not adversely affected; (ii) the members of the Global Health Claimant Class would undoubtedly have consented to the representation had it been possible to consult them; and (iii) this Court's careful scrutiny of the settlement and the process by which it was negotiated, is, as Professor Hazard testified, an effective substitute for that consent in the context of a class action settlement. Tr. at 1024-25, 1192-93, 2340-41. The Court would therefore consent on behalf of the Global Health Claimant Class to the representation of the Class by Class Counsel, subject to amendment of the SCB provision of the Trust Agreement as discussed above. See Findings of Fact ¶¶ 364-369.

371. Indeed, given the eminent fairness of the Global Settlement, and in view of the specific factors set forth below, this Court finds that it would be wrong to label Plaintiffs' Counsel's zealous representation as unethical, or to deprive the class members of the substantial benefits of the settlement, solely because the members of the class were so numerous that

it was impossible to obtain informed consent to the representation from each individual class member.

372. In making this finding the Court relies on the following further findings:

> --There is no credible evidence in the record that the alleged material limitation on the representation resulted in any prejudice to the Global Health Claimant Class or otherwise materially impaired Plaintiffs' Counsel's representation of the class. The Ortiz Intervenors' entire presentation to the Court consists of unsubstantiated speculation that other, ostensibly unconflicted counsel "might" have gotten a better deal and that this Court's fairness review cannot eliminate that possibility. Tr. at 1777-78, 1837, 1856-57, 1868, 1901. Indeed, Professor Leubsdorf conceded that he was unaware of any actual prejudice that the members of the Global Health Claimant Class had suffered as a result of the alleged conflicts. Tr. at 1901.
>
> --Plaintiffs' Counsel acted vigorously and diligently in representing the Global Health Claimant Class and believed that they were acting in the best interests of the Global Health Claimant Class as a whole. Findings of Fact ¶¶ 296, 315, 326, 328, 331, 342, 354, 363.
>
> --Plaintiffs' Counsel's representation of present claimants against Fibreboard redounded to the advantage, rather than the disadvantage, of the Global Health Claimant Class. Findings of Fact ¶ 329.

--There is no credible evidence of the existence of other "conflict-free" counsel who were qualified to negotiate a fair, reasonable and adequate global settlement. Findings of Fact ¶¶ 317-324.

--Had there been as many separate attorneys representing the Global Health Claimant Class as Professor Leubsdorf opined that there should have been, there is a significant possibility that a global settlement would not have been reached before the Coverage Case was resolved by the California Court of Appeal. Tr. at 1558-59, 1917, 2345.

--There is no evidence that Global Health Claimant Class members would have benefited in any way from representation by allegedly "conflict-free" counsel.

--The overwhelming majority of the members of the Global Health Claimant Class, including the class representatives, have not objected to the alleged conflicts of interest. Findings of Fact ¶ 203.

--The Guardian Ad Litem has independently scrutinized the settlement negotiations and is satisfied that Plaintiffs' Counsel "exhausted every possible benefit they could get for the Class" and that the settlement is a "very good deal." Tr. at 2786-88.

--The Global Settlement is more favorable to the Global Health Claimant Class than the Trilateral Settlement. Findings of Fact ¶¶ 231-243.

--Because of changed circumstances, there is a substantial risk that a renegotiation of the Global Settlement today would result in a settlement less favorable to the Global Health Claimant Class than the Global Settlement that was in fact concluded. Findings of Fact ¶¶ 269-272.

--The Global Settlement is fair, reasonable and adequate from the standpoint of members of the Global Health Claimant Class. Findings of Fact ¶¶ 191-204.

D. Fees

373. In mid-June 1993, Messrs. Rice and Cox met with Messrs. Wachtell and Koplow in Washington, D.C. At that meeting several issues were discussed in connection with the costs of administering a global settlement were one to be reached including the question of legal fees for Plaintiffs' Counsel. Mr. Wachtell raised the subject of legal fees in the context of his firm's experience in securities fraud cases, making clear that Continental would not be prepared to pay a fee to class counsel in a Fibreboard class action settlement that would approach the 25% fees sometimes awarded class counsel in securities fraud class actions. Mr. Wachtell stated that he would recommend to Continental that it agree to pay Plaintiffs' Counsel's fees up to a capped amount of 3% of the settlement amount, were such fees to be awarded by the Court and affirmed upon any appeal. The issue of Plaintiffs' Counsel's fees had not been discussed with Continental at this point, and Mr. Koplow made it clear to Messrs. Rice and Cox that even the 3% figure would have to be discussed with and agreed to by Continental. Mr. Rice made it clear that any fee, whatever the

amount, would have to be paid separately from, and not out of the proceeds of, the settlement fund. Tr. at 111012, 1387-93, 1590-91.

374. Plaintiffs' Counsel understood, and Judge Higginbotham made clear to them during the negotiations, that they could not assume that any particular fee would be awarded to them by this Court. Tr. at 672, 1592.

375. Further discussions between the Insurers and Plaintiffs' Counsel regarding Plaintiffs' Counsel's fees did not occur again until August 1993. Tr. at 1591. On August 27, 1993 -- when the Global Settlement agreement in principle was announced in open court -- the Settling parties set forth their agreement that (i) should this Court award Plaintiffs' Counsel fees, those fees would be paid by the Insurers as an additional obligation separate from their obligation to fund the Global Settlement itself, and would not be paid out of the Global Settlement fund; and (ii) the Insurers' obligation to pay such fees would be capped at 3% of the settlement amount. Fibreboard Exh. 592.

376. This Court finds that there is no credible evidence that Plaintiffs' Counsel were promised, or could assume that they would receive, any particular amount of attorneys' fees in connection with their service as counsel to the Global Health Claimant Class. In addition, the Court finds that there is no credible evidence that the amount of the attorneys' fees Plaintiffs' Counsel might receive in connection with this action had any negative effect whatsoever on their effectiveness as vigorous advocates for the interests of the Global Health Claimant Class.

XIII. GUARDIAN AD LITEM

377. Plaintiffs' Counsel have been heavily involved in representing asbestos-related personal injury claimants, including claimants who are not members of the Global Health Claimant Class, over the last ten to twenty years. See Findings of Fact ¶ 293. Because this fact could give rise to assertions of conflicts of interest in connection with Plaintiffs' Counsel's representation of the Global Health Claimant Class, on October 12, 1993, this Court appointed Professor Eric D. Green, of the Boston University School of Law, to serve as Attorney Ad Litem on behalf of the Global Health Claimant Class. Order Appointing Attorney Ad Litem, Dkt. No. 35 (Oct. 12, 1993).[34]

378. Professor Green is fully knowledgeable in asbestos mass tort matters, and has served as Special Master in many such litigations,[35] but has not represented asbestos

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[34]Subsequently, by Order dated March 15, 1994, this Court changed Professor Green's designation to "Guardian Ad Litem" and provided him with judicial immunity from suits related to his activity in this lawsuit. Order Appointing Guardian Ad Litem, Dkt. No. 117 (March 15, 1994).

[35]Professor Green has served in the following capacities: Special Master, N.D. Ohio, Ohio Asbestos Litigation; Special Master, D. Mass., Massachusetts Asbestos Litigation; Special Master, D. Conn., Connecticut Asbestos Litigation; Special Master, Massachusetts Superior Court, State Asbestos Litigation; Advisor to the Trustees of the Manville Personal Injury Settlement Trust. Tr. at 2715-17; Order Appointing Attorney Ad Litem, Dkt. No. 35 (Oct. 12, 1993). In addition, Professor Green was asked by the Administrative Office of the United States Courts to perform a study of methods of handling asbestos litigation, and he completed that study in the mid-1980s.

(continued...)

claimants. He has taught at Boston University School of Law for seventeen years, where his principal areas of academic involvement have been dispute resolution and evidence. He has also taught constitutional law, legal ethics and legal process. In addition, Professor Green ha been a mediator since 1977, conducting mediations and facilitating settlements in thousands of cases, including personal injury, toxic tort and environmental cases. As part of that practice, Professor Green teaches and writes about the negotiating process. He has also participated with members of the judiciary and the bar at numerous conferences concerning litigation, settlement and alternative dispute resolution generally, and asbestos litigation in particular. Report of the Guardian Ad Litem ("Guardian's Report) at 2-4; Tr. at 2717-18.

379. As stated in this Court's Order appointing Professor Green, "the Court is of the view that it would be desirable that there be the appointment of [a guardian] ad litem who is fully knowledgeable in asbestos mass tort matters but does not actively represent asbestos claimants. The function of the [guardian] ad litem is to review the settlement from the point of view of members of the [Global Health Claimant] Class and thereby to afford the Class additional assurance that their interests will be adequately protected." Order Appointing Attorney Ad Litem, Dkt. No. 35 (Oct. 12, 1993). In addition, this Court directed Professor Green "to render a report to the Court analyzing the fairness, reasonableness and adequacy of the settlement from the point of view of members of the provisionally certified Class and advise the Court from the point

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(...continued)
Tr. at 2715-17.

of view of Class members as to such further aspects of this proceeding as the Guardian Ad Litem deems appropriate or as the Court may request." Order Appointing Guardian Ad Litem, Dkt. No. 117 (March 15, 1994). Professor Green was identified in the Notice of Class Action, Global Settlement and Third-Party Claimant Class Settlement and Hearing sent to class members, and a post office box address was set forth therein so that class members could send any comments they might have directly to Professor Green. Continental Exh. 28.

380. In carrying out this appointment, Professor Green closely reviewed both the history of the negotiations that led to the Global Settlement, as well as the result of the negotiations as embodied in that settlement, to determine whether the settlement was the result of fraud or collusion on the part of any of the parties to the Global Settlement. Professor Green carefully considered the history and possible future of asbestos-related litigation in general, Fibreboard's involvement in asbestos-related litigation in particular, and the insurance coverage litigation between Fibreboard and the Insurers. He considered the prospects and procedures that would be faced by future asbestos claimants in the tort system, including the litigation strategies that may be adopted by the parties, the transaction costs and delays involved in the tort system, and the potential impact of bankruptcy. Professor Green compared the results to be had under the tort system with the claims evaluation and dispute resolution procedures provided under the TDP. Guardian's Report at 4-5; Tr. at 2719-21.

381. Professor Green also assessed the range of possible recovery by the members of the Global Health

Claimant Class, and in doing so considered three alternative scenarios: (i) approval of the Global Settlement; (ii) approval of the Trilateral Settlement and disapproval of the Global Settlement; and (iii) disapproval of both the Global and Trilateral Settlements, with resultant reliance on the outcome of the Coverage Case. In considering these scenarios, Professor Green also took into account: (i) the various projections of the likely number of future claims for personal injuries caused by Fibreboard asbestos, the methods of setting a range of values for those claims, and the amount of funds available to compensate those claims under the Global Settlement; (ii) the impact on the Global Health Claimant Class of provisions in the Global Settlement Agreement that restrict the rights of class members that would otherwise be available in the tort system; and (iii) the impact of the Global Settlement on various segments of the Global Health Claimant Class, including those who have already-existing claims, those whose diseases will not be diagnosed for many years, those whose first exposure to Fibreboard asbestos was before March 15, 1959, those whose first exposure was after that date, those who have contracted or will contract more serious asbestos-related diseases, and those whose diseases are or will be less severe. Guardian's Report at 5-6; Tr. at 2721-22.

382. Professor Green also considered the possibility that, were the Coverage Case appeal to go forward, such appeal could result in a decision adverse to Fibreboard (and thus adverse to the members of the Global Health Claimant Class). Professor Green also considered the financial resources that are likely to be available to compensate class members under the Global Settlement as compared to the resources available to the class under the Trilateral Settlement, including

an assessment of the gross funds generated under each settlement as well as the net funds likely to be received by class members. This involved an analysis of the transaction costs involved in each alternative settlement scenario, and the value of Fibreboard itself. Guardian's Report at 6; Tr. at 2723.

383. Professor Green also took into account the opinions of Plaintiffs' Counsel, the class representatives and other members of the Global Health Claimant Class. In doing so he (i) carefully considered the views of Plaintiffs' Counsel as expressed in their testimony and in private interviews he conducted; (ii) carefully considered the statements of the class representatives in their depositions, pleadings and private interviews; (iii) reviewed every letter sent to him by class members, considered comments made by class members in private interviews, and took into account the contents of all objections and motions to intervene filed by class members; and (iv) considered statements made on the record by counsel for the intervenors and objectors and comments provided to him in private interviews. Professor Green also considered the views of other members of the plaintiff's bar in many private interviews, and the reactions to the settlement expressed by various groups such as the AFL CIO, the White Lung Association and others. Guardian's Report at 6; Tr. at 2723-24.

384. To assist him in this undertaking, Professor Green enlisted the assistance of James Ryan (a former worker's compensation judge) and Professor Dwight Golann. Professor Green was also aided by a registered nurse/attorney with experience in the health care field, and by a research associate. To assist in his understanding of the epidemiological evidence presented in the case, Professor Green retained a

professor in epidemiology and biostatistics at the Harvard School of Public Health as an expert consultant. Professor Green also consulted with an expert in civil procedure in evaluating the impact of the settlement on joint and several liability, contribution and indemnity issues as they could affect Global Health Claimant Class members, and informally consulted with other experts regarding financial questions such as the likely return to the Trust on the Trust's assets. Guardian's Report at 7-9; Tr. at 2726, 2728.

385. Professor Green and his team personally attended or otherwise participated in almost every court conference or hearing held since his appointment, and he has reviewed the transcript of every proceeding conducted in this case before his appointment. Professor Green participated in the hearing regarding the providing of notice to the Global Health Claimant Class, reviewed all the notice documents and the notice dissemination plan, and provided comments to the Court and to the Settling Parties regarding the text of the notice and the method of its dissemination. Professor Green attended all eight days of the fairness hearing in this action, and frequently asked questions of the witnesses. Professor Green and his colleagues fully participated in all discovery, attended all depositions, frequently asked questions, and received and reviewed all documentary discovery produced by the Settling Parties (over 827 documents totaling over 17,500 pages). Professor Green has stated that he "found the settling parties to be a hundred percent cooperative with all [his] requests" for information. Tr. at 2727-28. He and his staff also received and reviewed all of the pleadings, motions, memoranda and briefs in this case. Guardian's Report at 8-13; Tr. at 2726-27.

386. Based on these efforts, as well as his experience, Professor Green set forth his views both orally at the fairness hearing and in a 92-page report to this Court. First, Professor Green stated that the members of the Global Health Claimant Class share a desire for fairness (including a belief that more seriously ill claimants should be paid first), certainty of funding, fast and simple claims processing, and protection for all class members. Of the several hundred comments received from class members, only 23 expressed any opposition to the Global Settlement, and most of those were based on misconceptions regarding the functioning of the settlement. Guardian's Report at 13-18; Tr. at 273642.

387. Second, Professor Green found no evidence of fraud or collusion, either with regard to the value of the settlement, the class definition (including the "cut-off date" element of that definition), the TDP or the valuation of cases. It was his view that no benefit to Plaintiffs' Counsel from the settlement at the expense of others had been identified or proved. Professor Green scrutinized the settlement for evidence that the interests of the Global Health Claimant Class might have been sacrificed by Plaintiffs' Counsel for their own benefit or the benefit of their other clients. He detected no evidence of this. To the contrary, Professor Green was of the view that the Global Settlement negotiations were conducted at arm's length by experienced and capable counsel, and that the negotiations were in fact frequently marked by conflict among the various parties. Guardian's Report at 20-27; Tr. at 2744, 2747.

388. Third, Professor Green expressed the view that the creation of the Trust by the Global Settlement relieves the class members of the risk of a loss by Fibreboard of

the Coverage Case appeal, the risk that Fibreboard's assignment program might be found to have vitiated the policy coverage, and the risk of a Fibreboard bankruptcy that would likely result if the Coverage Case were lost in whole or in part by Fibreboard. Professor Green determined that the use of a trust would greatly reduce the transaction costs -especially attorneys' fees -that would be incurred in the tort system, and that the net amount to be received by class members would be greater under the Global Settlement than under a corresponding settlement in the tort system. He also expressed the view that the procedures under the TDP are fair and reasonable, including the spendthrift provisions and the definition and prioritization of five disease categories, and that the TDP should enable class members to obtain compensation in a faster and more rational manner than would be provided in the tort system. In particular, Professor Green expressed the view that the claims management and dispute resolution procedures of the Trust are designed to and will promote the prompt, inexpensive and fair resolution of claims. Guardian's Report at 28-29, 35-38; Tr. at 2748-51.

389. Fourth, Professor Green stated that the Select Counsel for the Beneficiaries is a useful device for ensuring that the Trust provides fair and equitable compensation to class members. Nevertheless, he expressed the view that any attorney who prosecutes claims against the Trust should not also serve on the SCB. Professor Green noted that as Guardian Ad Litem he was not empowered to compel amendment of the Global Settlement Agreement and stated that, he would urge approval even if no such limitation on who may serve on the SCB were adopted. Guardian's Report at 89-91; Tr. at 2753-55. Subsequent to the fairness hearing, and in resoponse to the concerns expressed by Professor Green and by the Court, the

Settling parties agreed to the Third Amendment to the Trust Agreement ("Third Amendment") as set out in Findings of Fact ¶ 368. Professor Green advised the Court that the third Amendment ameliorated his major concerns regarding the appointment and powers of the SCB, and expressed the opinion that "the Amendment adopted by the Settling parties was a wise and appropriate response to those concerns." Letter to Judge Parker from Eric D. Green, dated June 12 1995.

390. Fifth, Professor Green identified several areas in which the members of the Global Health Claimant Class had given up rights in exchange for achieving the Global Settlement. In each instance, however, he concluded that it was reasonable for the class to have done so:

--The class releases certain rights to recover against Fibreboard and the Insurers, and thus bears the risk that the settlement funds might be insufficient. However, Professor Green believes that this is reasonable in light of the amount of money provided for by the Global Settlement and the other benefits achieved thereby. Guardian's Report at 28-30; Tr. at 2755-56.

--The class members are not permitted to opt out of the Global Settlement; however there is a right to exit to the tort system at the back end of the process that lessens the effect of this provision. Guardian's Report at 30; Tr. at 2756.

--Class members are barred from recovering punitive damages, judgments in excess of $500,000 in a single case, preand post-judgment interest, and judgments that

impose joint and several liability. Professor Green found, however, that punitive damages and judgments greater than $500,000 have rarely been awarded against Fibreboard, that settlements generally do not provide for the payment of interest, and that all of these limitations on the right to recover damages -- including the right to recover under a theory of joint and several liability -- benefit the class as a whole by maximizing the likelihood that funds will be available to pay all claimants. Guardian's Report at 30-32; Tr. at 2756-59.

391. Professor Green also carefully assessed whether it is fair, under the Global Settlement, that Fibreboard not pay more money into the settlement fund. He concluded that Fibreboard had contributed substantially to the settlement by managing the developing its disputed insurance coverage into a very valuable asset, and then transferring that asset to the Global Health Claimant Class. Guardian's Report at 34; Tr. at 2760-61.

392. Professor Green further concluded that, despite the work done by Drs. Nicholson, Peterson and Vasquez, one cannot predict with any confidence the number of future claims against Fibreboard. This is due to the number of key assumptions that must be made -- such as regards propensity to sue and the incidence of nonmalignancies -- and the range in those assumptions. Accordingly, Professor Green's assessment of the fairness and reasonableness of the Global Settlement is not premised on the accuracy of any particular prediction as to the number of future claims. Guardians' Report at 38-54; Tr. at 2761-64.

393. Professor Green analyzed the benefits and risks to the class under three alternative scenarios: (i) approval of the Global Settlement; (ii) approval of the Trilateral Settlement but disapproval of the Global Settlement; and (iii) disapproval of both the Global and Trilateral Settlements (and thus reliance on the outcome of the Coverage Case). He concluded that -- with respect to the third scenario -- there is a substantial risk of reversal by the California Supreme Court of the California Court of Appeal's decision, and that, even if that risk were small, the result of such reversal would be so catastrophic for members of the Global Health Claimant Class that the risk should not be taken. Accordingly, Professor Green concluded that "it would be extremely risky and potentially devastating and tragic if both the Global and Trilateral Settlements were ultimately rejected by the courts." Tr. at 2705; see also Guardian's Report at 56-76; Tr. at 2764-65.

394. Professor Green also concluded that a number of "nonmonetary" factors weigh in favor of finding the Global Settlement superior to the Trilateral Settlement. In Professor Green's view, the Global Settlement will mitigate or eliminate any "race to the courthouse" by plaintiffs' lawyers that might occur under the Trilateral Settlement, the result of which would be inequitable distribution of settlement funds to claimants. Professor Green also stated that Global Settlement will eliminate the "lottery effects" often seen in asbestos litigation, in which a seriously ill claimant may recover a little while a far less seriously ill claimant hits the jackpot. These lottery effects would be present under the Trilateral Settlement. Professor Green observed that the tort system itself may change significantly in the next five to ten years, creating uncertainty as to the ability of claimants to recover for products liability claims

in the tort system. The Global Settlement eliminates this uncertainty. Guardian's Report at 76-78; Tr. at 2769-70.

395. Professor Green concluded that formal subclasses are not required. That conclusion was based on his view that, to the extent that various subgroups within the Global Health Claimant Class might have conflicting interests, those conflicts are far less significant than the common interests shared by those same subgroups -- the most overwhelming of which is their common interest in avoiding the risk of a loss by Fibreboard in the Coverage Case. Guardian's Report at 78-86; Tr. at 2771-85.

396. Professor Green expressed the view that the Global Health Claimant Class was fairly and adequately represented both by the class representatives and by Plaintiffs' Counsel. In particular, Professor Green emphasized the extensive experience Plaintiffs' Counsel brought to this matter -- and the importance to the Global Health Claimant Class of that experience -- as well as the unending vigor with which they pursued settlement benefits on behalf of the class. Professor Green agreed with the opinion of Professor Hazard that the contingent back-end payments to be paid under the Substitute Ness Motley Agreement only served to cause Plaintiffs' Counsel to redouble their efforts to achieve the best possible settlement for the class. Guardian's Report at 86-89; Tr. at 2785-88.

397. In conclusion, Professor Green stated that the Global Settlement is fair, reasonable and adequate, and should be approved. Guardian's Report at 91-92; Tr. at 2788-89.

XIV. LONGSHORE SETTLEMENT

398. Under LHWCA, certain employers and their insurance carriers (collectively, "Longshore employers") are required to provide compensation to their employees to or certain family members of those employees for injuries and death arising out of their employment. 33 U.S.C. §§ 903(a) and 904(b). In return for requiring a Longshore employer to pay this compensation, LHWCA grants the Longshore employer a number of specific benefits and protections, including the right (under specified circumstances) to "set off" against the Longshore employer's LHWCA obligations any recovery a Person entitled to compensation may obtain in a lawsuit against a third party arising out of the same injury that gives rise to the LHWCA claim. 33 U.S.C. § 933(f). Where the person entitled to compensation recovers as much or more from the third party as the employee would have received from his or her employer under LHWCA for the same injury, then the Longshore employer owes that employee no LHWCA benefits. Id. In addition, if the Longshore employer has already paid LHWCA benefits to the person entitled to compensation prior to the employee's recovery of damages from the third party for the same injury, then the Longshore employer is, by common law, entitled to lien rights against the employee's recovery for an amount equal to the prior payments.[36]

399. Title 33 U.S.C. § 933(g) is designed to prevent a Longshore employer from being wrongfully deprived

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[36] See, e.g., Bloomer v. Liberty Mut. Ins. Co., 445 U.S. 74, 79 (1980), and cases cited therein; Bethlehem Steel Corp. v. Mobley, 920 F.2d 558, 561 (9th Cir. 1990).

of its set-off rights. Under this provision, if the person entitled to compensation obtains a judgment against a third party, or settles for an amount greater than the benefits to which he or she would be entitled under LHWCA, the person entitled to compensation must give the Longshore employer notice of such settlement or judgment. 33 U.S.C. § 933(g)(2). If the person entitled to compensation settles with a third party for an amount less than the LHWCA compensation, "the employer shall be liable for compensation . . . only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and [sic] by the person entitled to compensation (or the person's representative)." 33 U.S.C. § 933(g)(1).

400. If a person entitled to compensation fails to comply with the applicable notice and approval provisions, "all rights to compensation and medical benefits under [LHWCA] shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits . . . ." 33 U.S.C. § 933(g)(2).

401. During the Fall of 1993, Plaintiffs' Counsel were concerned that Longshore employers might seek to use the execution and consummation of the Global Settlement as a justification for nonpayment of benefits to those members of the Global Health Claimant Class who are also persons entitled to compensation under LHWCA with respect to asbestos-related personal injuries that form that basis of the claims being settled in the instant class action. Specifically, Plaintiffs' Counsel were concerned that Longshore employers might assert that the Global Settlement and related judgment

constitute either (i) a settlement under § 933(g)(1) or (g)(2) of LHWCA as to which the Longshore employers had not been notified and given their approval; or (ii) a judgment under § 933(g)(2) of LHWCA as to which the Longshore employers had not been notified, with the result -in either case -that the affected members of the Global Health Claimant Class would forfeit their rights to compensation from the Longshore employers under LHWCA. Lockwood Aff. at ¶3.

402. Plaintiffs' Counsel believed that such an assertion by Longshore employers would fail as a matter of law. Out of an abundance of caution, however, Plaintiffs' Counsel negotiated for the inclusion in the Global Settlement Agreement of certain provisions intended to prevent the successful assertion of this argument by any Longshore employer. Specifically, § 2.2(B) of the Global Settlement Agreement provides: The claims of Persons providing workers com-ensation benefits to Settlement Class Members shall be directed to the Trust, instead of Fibreboard Corporation or the Insurers, and disposed of pursuant to the Trust Agreement and the Trust Distribution Process. Such Persons providing workers compensation benefits shall have existing remedies, whether by way of lien rights against a Settlement Class Member's Claim against the Trust, subrogation, direct action, or otherwise, against the Trust (instead of Fibreboard Corporation or the Insurers), subject only to the provisions of the Trust Agreement and Trust Distribution Process. Only payment of funds pursuant to a Settlement Class Member's individual settlement with the Trust, and not this Agreement (or the resulting Global Approval Judgment, dismissal and release), shall trigger the notice, approval and forfeiture provisions of the Longshore and Harbor Workers Compensation Act (33 U.S.C. Section 933) and other similar

state and federal workers compensation provisions. Lockwood Aff. at ¶4; Fibreboard Exh. 912 (Global Settlement Agreement) at § 2.2B.

403. The Global Settlement Agreement further provides that it will become fully effective only upon "Global Approval Judgment" -a term defined in the Glossary annexed to the Global Settlement Agreement. As so defined, the requisite Global Approval Judgment (at paragraph i) includes a declaration by the Court "that, as provided in Section 2.2(B) of the Global Settlement Agreement, only payment of funds pursuant to the [Global Health Claimant] Class Members' individual settlements with the Trust shall trigger the notice, approval and forfeiture provisions of the Longshore and Harbor Workers Compensation Act and other similar state and federal workers compensation provisions . . . ." Fibreboard Exh. 912 (Glossary) at ¶ 47(i).

404. Following the execution of the Global Settlement Agreement, motions to intervene in the instant class action were filed in the Spring of 1994 by (i) the Director, Office of Workers' Compensation Programs, United States Department of Labor; and (ii) Roland Dearborn and Kerwin Butcher, two employees who alleged that they sustained exposure to asbestos at a worksite subject to LHWCA, and Mr. Dearborn's wife, Judith Dearborn (collectively, the "Dearborn Intervenors"). The Director and the Dearborn Intervenors questioned whether the provisions of the Global Settlement Agreement and Global Approval Judgment described above would be effective to bind Longshore employers under the provisions of LHWCA. This Court thereafter granted intervention as a matter of right to the Director and permissive

intervention to the Dearborn Intervenors. Lockwood Aff. at ¶ 6; Motion by Roland Dearborn, Judith Dearborn and Kerwin Butcher to Intervene, Dkt. No. 136 (April 19, 1994); Motion to Intervene by Director, Workers' Compensation Programs, Dkt. No. 159 (May 11, 1994); Order Granting Motions to Intervene, Dkt. No. 178 (May 16, 1994).

405. Although Plaintiffs' Counsel disagreed with the positions taken by the Director and the Dearborn Intervenors with respect to the LHWCA issues presented by them, they decided to take still further steps to insure that the Global Settlement did not adversely affect and LHWCA rights held by members of the Global Health Claimant Class. Accordingly, on July 27, 1994, on leave of this Court, Plaintiffs' Counsel filed an amended complaint in this action which, inter alia, (i) added James Ellison as a representative of the Global Health Claimant Class; and (ii) asserted claims for declaratory and injunctive relief against Bethlehem, both in its individual capacity and as a representative of a class of Longshore employers and their insurers as defined in paragraph 49 of the Amended Complaint (the Longshore Defendant Class). In particular, the Amended Complaint sought a declaration that "the entry of Global Approval Judgment and/or consummation of the Global Settlement Agreement will not constitute a 'settlement' under 33 U.S.C. § 933(g) which would operate to create a forfeiture of the LHWCA compensation rights of Plaintiff Class members against members of the Longshore

Defendant Class." Lockwood Aff. at ¶ 7; Amended Complaint, Dkt. No. 304 (July 29, 1994).[37]

406. Following the filing of the Amended Complaint, Mr. Lockwood, as counsel to Plaintiffs' Counsel, engaged in extended arm's length negotiations with Mr. Bauman concerning a possible settlement of the LHWCA claims asserted therein against Bethlehem and the Longshore Defendant Class. There is no evidence or suggestion of any collusion or fraud in this process. In the course of those negotiations, Mr. Lockwood consulted with Plaintiffs' Counsel, counsel for the Director, counsel for other parties to the Global Settlement, counsel for the Dearborn Interventors, counsel for a group of Longshore employers on the West Coast, and counsel for at least one other member of the Longshore Defendant Class. In addition, Mr. Lockwood furnished copies of draft settlement documents being exchanged between him and Mr. Bauman to the other counsel described in this paragraph, and received their comments on those drafts. Lockwood Aff. at ¶ 9.

407. Mr. Bauman, in addition to his negotiations with Mr. Lockwood, also conferred with and sought input from several representatives of Longshore employers. In particular, Mr. Bauman consulted with Mr. Robert Babcock, an attorney who represents a cross-section of Longshore employers and who serves as President and Legal Advisor of the Longshore Claims Association, a not-for-profit association of approximately 130 maritime employers, carriers

[37]On February 9, 1995, the Court approved an amendment to the Longshore Settlement clarifying the definition of the Longshore Defendant Class. Order, Dkt. No. 731 (Feb. 9, 1995).

and third-party administrators. Mr. Babcock raised several legal issues on behalf of these clients, and these concerns were taken into account in the negotiations. Bauman Aff. at ¶ 3.

408. At the conclusion of the negotiations described above, the Global Health Claimant Class representatives (on behalf of themselves and the Global Health Claimant Class), Bethlehem (on behalf of itself and the Longshore Defendant Class), and the Director executed a Stipulation of Settlement dated as of December 5, 1994, reflecting a settlement of the claims asserted in the Amended Complaint against Bethlehem and the Longshore Defendant Class ("the Longshore Settlement"). Lockwood Aff. at ¶ 10. The Longshore Settlement, if approved, will enable to Court to enter the LHWCA-related judgment provision set forth in the Global Approval Judgment described above. Lockwood Aff. at ¶ 18.

409. Because of the importance of securing a binding determination by this Court of the impact of the Global Settlement on the respective rights under LHWCA of the members of the Global Health Claimant Class and the members of the Longshore Defendant Class, Plaintiffs' Counsel intended -- in the absence of a settlement -to litigate to a final judgment the claims asserted in the Amended Complaint against Bethlehem and the Longshore Defendant Class. Lockwood Aff. at ¶ 21.

410. By the time the Longshore Settlement was concluded, Plaintiffs' Counsel had been considering the issues presented for more than one year, first in connection with the negotiation of the Global Settlement Agreement, and

thereafter in connection with the intervention motions filed by the Director and the Dearborn Intervenors. In addition, Plaintiffs' Counsel were aware of and closely followed the litigation of similar LHWCA issues in the Georgine class action. Finally, during the four months of negotiations that resulted in the Longshore Settlement, Plaintiffs' Counsel performed additional research into LHWCA issues and had extensive discussion concerning those issues with counsel for other parties to the Longshore Settlement and the Global Settlement. Lockwood Aff. at ¶ 22. Likewise, counsel for Bethlehem were fully familiar with workers' compensation law generally, and LHWCA in particular, as well as the provisions of the Global Settlement. Bauman Aff. at ¶¶ 1, 6.

411. Counsel for the parties to the Longshore Settlement were thus fully informed about the LHWCA issues raised in the Amended Complaint, and the Longshore Settlement reflects the parties' informed evaluation of the respective merits of their legal positions with respect to those issues. Although Plaintiffs' Counsel were confident that they would prevail in the event the LHWCA issues were litigated to judgment, they also knew that such litigation could delay obtaining Global Approval Judgment and complicate the process of obtaining approval of the Global Settlement. Lockwood Aff. at ¶ 23. Counsel for Bethlehem concluded that there existed a substantial possibility that Bethlehem would lose a litigation concerning the LHWCA issues presented by the Amended Complaint. Bauman Aff. at ¶ 6.

412. On February 2, 1995, the Court conducted a hearing with respect to the Longshore Settlement. The Settling Parties offered the affidavits of Mr. Lockwood, as

representative counsel for the Global Health Claimant Class, Mr. Bauman, as counsel for the Longshore Defendant Class, and Katherine Kinsella (attesting to the completion of a notice plan with respect to the Longshore Settlement, see Findings of Fact ¶¶ 418-446). In addition, Messrs. Lockwood and Bauman spoke at the hearing concerning the benefits of the Longshore Settlement to their classes. Ronald Lupton, Esq., spoke providing his assent to the settlement on behalf of the Dearborn Intervenors, and Michael Hertzig, Esq., noted that the Director urged the Court to approve the settlement.

413. Only one objection to the Longshore Settlement has been filed with the Court, which consisted of a two-page perfunctory list of objections, along with the assertion that the objector was not a member of the Longshore Defendant Class. No member of either the Longshore Defendant Class or the Global Health Claimant Class appeared at the hearing to voice an objection.

414. Considering all the evidence before it, this Court finds that the Longshore Settlement -by removing a possible obstacle to the entry of a Global Approval Judgment - potentially makes available a guaranteed fund in excess of $1.5 billion to compensate members of the Global Health Claimant Class, persons who might otherwise recover little or nothing for their injuries, while also potentially reducing the net compensation obligations of the members of the Longshore Defendant Class to members of the Global Health Claimant Class. Lockwood Aff. at ¶ 18; Tr. at 2295-96.

415. The Longshore Settlement also protects the interests of the members of the Global Health Claimant Class

by insuring that the Global Settlement will not be determined at some future date to create a forfeiture of the LHWCA rights of such class members. Concurrently, the Longshore Settlement protects the rights of members of the Longshore Defendant Class to (i) obtain liens or credits; (ii) receive notice and an opportunity to approve settlements; and (iii) be informed of judgments and arbitration awards when Global Health Claimant Class members pursue claims against the Trust. Lockwood Aff. at ¶ 19 and Exh. B (Stipulation of Settlement); Bauman Aff. at ¶ 6.

416. The Longshore Settlement does not improperly grant preferential treatment to class representatives or segments of the classes, and there are no differences that exist under the Longshore Settlement with respect to different segments of either the Global Health Claimant Class or the Longshore Defendant Class. Lockwood Aff. at ¶ 20 and Exh. B (Stipulation of Settlement).

417. Based upon the credible evidence, this Court finds that the Longshore Settlement was the product of serious, informed, non-collusive negotiations, and is fair, reasonable and adequate.

XV. ADEQUACY OF NOTICE

418. At the instance of the Settling Parties, notice to the classes in this action has been the most detailed and widespread notice of which this Court is aware.

419. The notice materials proposed by the Settling Parties included an extremely detailed "Notice of Class

Action, Global Settlement and Third-Party Claimant Class Settlement and Hearing"; an "Overview of and Questions and Answers on the Global Settlement Agreement and the Ahearn Class Action," designed to explain the notice in a more conversational manner; a newspaper notice advertisement for use in domestic newspapers; a newspaper notice advertisement for use in international newspapers; a notice advertisement to be published in Parade and USA Weekend; a notice advertisement to be published in American Association of Retired Persons Bulletin, Business Week and various trade, association and union publications; the script for a 30-second television notice advertisement; camera-ready materials for use in publications of unions and other organizations; a press release and announcement script for distribution to newspapers, television, radio and wire services; the script to be used by telephone operators when answering calls placed by potential class members to advertised toll-free telephone numbers; various cover letters to be sent with the notification materials; and various other materials. Joint Motion of the Settling Parties for Preliminary Approval of Class Action Settlements, for Approval of Notice to the Classes and for Scheduling of Final Fairness Hearing, Dkt. No. 253 (June 28, 1994); Notice of Class Action, Global Settlement and Third-Party Claimant Class Settlement and Hearing (Continental Exh. 28); Overview of and Questions and Answers on the Global Settlement Agreement and the Ahearn Class Action (Continental Exh. 30); Affidavit of Katherine Kinsella, sworn to July 12, 1994 (Continental Exh. 7). The Court has reviewed these materials and finds that the notice campaign accurately, clearly and -- in the case of the primary notice documents -- comprehensively, set forth all pertinent information that class members would reasonably believe to be

material in considering the proposed settlement of this class action.

420. The Settling Parties retained Katherine Kinsella to design and oversee implementation of a notice dissemination plan that would apprise class members of the settlement. Ms. Kinsella is the President of Kinsella Communications and a Senior Consultant to the Kamber Group, a large public relations and communications firm based in Washington, D.C. Tr. at 796-97. Ms. Kinsella specializes in marketing and advertising consultation. Tr. at 798.

421. For the past few years, Ms. Kinsella's primary work has been the design and implementation of class action notice plans -a field in which she has had extensive experience. She designed the national and Canadian notice plan pursuant to which notice was provided to asbestos health claimant and creditors classes in the Manville bankruptcy proceedings. Tr. at 797-98. She was similarly involved in the design and implementation of the national notice plan pursuant to which a class of future asbestos health claimants was provided notice in Georgine. Tr. at 798-99. This Court finds that Ms. Kinsella had more than ample qualifications to design and oversee the implementation of the notification plan in the instant action.

422. The proposed notice dissemination plan called for exhaustive efforts to provide notice to class members through a variety of methods. The Court finds that these efforts were reasonably designed to provide adequate notice to class members. These methods included:

--individual notice, by first class mail, to any potential Global Health Claimant Class member or Global Third-Party Claimant Class member whose name and address either was known or could be ascertained through reasonable efforts. This included any individual who identified himself or herself (or his or her organization) as a potential class member, either by calling one of two widely publicized toll-free "800" numbers (one of which is answered by Spanish-speaking operators) or by calling or writing to Global Health Claimant Class counsel or Global Third-Party Claimant Class counsel;

--notice targeted to numerous unions and other trade and labor organizations at the national, regional, state, and local levels, whose memberships might include members of the Global Health Claimant Class, or whose members might be able to assist in the notification effort;

--an extensive, multimillion dollar paid media campaign, utilizing two rounds of television advertising, including national network, cable and local television spots, newspaper advertisements, as well as advertisements in Parade, USA Weekend, American Association of Retired Persons Bulletin and Business Week;

--notice targeted to numerous professional, trade, industrial or legal publications whose

readership is likely to include either potential members of the Global Health Claimant Class or the Global Third-Party Claimant Class, or lawyers who routinely represent asbestos-related personal injury claimants or members of the Global Third-Party Claimant Class;

--an extensive free media campaign, including public service announcements concerning the proposed settlements via national wire services, national news radio stations, and in print, television and radio outlets in 151 media markets targeted for notification; and

--an international paid media campaign using print advertisements in approximately 40-50 international newspapers. Ahearn Class Action Notification Plan, Continental Exh. 9;

Tr. at 802-14.

423. The only objection related to the proposed notice or notice dissemination plan that was raised prior to the effectuation of that plan was voiced by the Ortiz Intervenors, who argued that it is inherently impossible to provide constitutionally adequate notice to class members who have no presently manifested injury.[38] The Ortiz Intervenors did

[38]The Flanagan Intervenors suggested, in one sentence and without explanation, that the notice itself was somehow incomplete. Brief of the Maritime Intervenors in Opposition to: Joint Motion of the Settling Parties for Preliminary Approval of Class Action Settlements, for Approval of Notice to the (continued...)

not, however, object to the specific contents of the proposed notice or the procedures provided for in the proposed notice dissemination plan submitted to the Court for review. Ortiz Intervenors' Objections to Settling Parties' Joint Motion for Preliminary Approval of the Settlement and Approval of Notice of the Settlement to the Class, Dkt. No. 278 (July 18, 1994), at 33-35.

On July 28, 1994, this Court held a hearing to consider the proposed notice and notice dissemination plan. Counsel for the Ortiz Intervenors, as well as counsel for other objectors, were present in the Courtroom. No objections to the proposed notice or notice dissemination plan were made. At the hearing the Settling Parties also submitted to the Court certain technical and typographical amendments to the notice materials. There was no objection to these amendments. Transcript of Hearing, Dkt. No. 325 (July 28, 1994).

425. On July 29, 1994, this Court issued an Order approving the form and substance of the Notice of Class Action Settlement and Third-Party Claimant Class Settlement and Hearing, as well as the related notification materials, for mailing and publication as set forth in the Ahearn Class Action

[38](...continued)
Classes and for Scheduling of Final Fairness Hearing, Dkt. No. 280 (July 19, 1994), at 3. As found by this Court herein, however, the notice materials were complete and accurate. Findings of Fact ¶ 419. The Dearborn Intervenors also asserted an objection to the notice, but that objection was mooted by the filing on July 29, 1994 of the Amended Complaint in this action against Bethlehem and the subsequent Longshore Settlement. Memorandum in Support of Longshore Intervenors' Objection to Joint Motion for Approval of Notice to Classes, Dkt. No. 290 (July 22, 1994).

Notification Plan, as amended at the July 28 hearing. This Court determined that "[d]issemination of notice as set forth in such notification plan . . . constitutes the best notice practicable under the circumstances, when given will provide due and sufficient notice to all members of the Global Health Claimant Class . . . , [and] satisfies the requirements of due process and Fed. R. Civ. P. 23 . . . ." Order Preliminarily Approving Class Action Settlements, Approving Notice to the Classes, and Scheduling a Final Fairness Hearing, Dkt. No. 316 (July 29, 1994), at 2-3. Having now reviewed all of the evidence presented, this Court hereby reaffirms its previous findings regarding the notice materials and the notification plan, set forth in its July 29, 1994 Order.

426. In the same Order, this Court further ordered that the Settling Parties commence notification of the members of the Global Health Claimant Class and Global Third-Party Claimant Class pursuant to the notification plan by August 1, 1994, with notice dissemination to be completed within ninety days thereof. The Settling Parties were also ordered to submit to the Court a certificate describing and certifying their compliance with the July 29 Order no later than twenty days before the date of the final fairness hearing in this action. Order Preliminarily Approving Class Action Settlements, Approving Notice to the Classes, and Scheduling a Final Fairness Hearing, Dkt. No. 316 (July 29, 1994), at 3.

427. On October 31, 1994, this Court issued an Order in response to a motion submitted by James Fite, Executive Director of the White Lung Association, to extend the notification period to members of the Global Health Claimant Class until November 10, 1994. Order, Dkt. No. 394

(Oct. 31, 1994). The motion was made on the ground that more time was needed to provide notice to members of the White Lung Association. Motion of White Lung Association, Dkt. No. 393 (Oct. 25, 1994), at 1-2. The Order states, inter alia, that "[a]lthough the Court is of the opinion that notification as approved in this Court's order of July 29, 1994 is more than sufficient, the Court is willing to allow supplementary notice as requested with the understanding that the extension will not affect any other deadlines currently in force, including the November 15, 1994 deadline for objections by all non-intervenor objectors." Order, Dkt. No. 394 (Oct. 28, 1994), at 1.

428. In addition to calling Ms. Kinsella as a live witness at the fairness hearing in this action, Tr. at 796-835, the Settling Parties submitted three reports to the Court, in the form of affidavits of Ms. Kinsella, describing the implementation of the notification plan. Affidavit of Katherine Kinsella, sworn to October 13, 1994 (Continental Exh. 11); Affidavit of Katherine Kinsella, sworn to November 21, 1994 (Continental Exh. 12); Affidavit of Katherine Kinsella, sworn to February 14, 1995 ("Third Kinsella Aff.").

429. The second of the three reports was submitted pursuant to the provision of the Court's July 29 Order requiring the Settling Parties to describe to the Court -- no later than twenty days before the final fairness hearing -- their efforts to comply with the provision of the July 29 Order directing that the notification plan be implemented. Also pursuant to the July 29 Order, the second report was accompanied by a "Certificate of Compliance with Orders Approving Notice to the Classes," certifying, inter alia, that the Settling Parties had in fact

complied with the July 29 Order. Certificate of Compliance with Orders Approving Notice to the Classes (Continental Exh. 13). The third report supplemented the second report, providing the Court with additional information concerning implementation of the notification plan.

430. As set forth in the second of the reports submitted by the Settling Parties (Continental Exh. 12), as of November 16, 1994:

> --notice packages containing a cover letter, the notice document, and the "Overview and Question and Answer" document had been mailed to 520,998 individuals who had requested such package by calling the toll-free telephone number, 589,845 individuals who were sent notice packages in the Georgine class action or who opted out of that action, and 171,669 individuals who worked at locations where Fibreboard asbestos was alleged to have been used;
>
> --notice packages were also sent to tens of thousands of unions, organizations, employers, hospitals, courts, lawyers, insurance companies, and other entities and individuals in the United States and abroad, that either requested such packages or that had been identified as being a potential class member or as having a relationship with potential class members; and

> --a 7" by 10" notice advertisement was mailed to 401,437 veterans and to 1,382,189 union members. See also Tr. at 812-13.

431. The Settling Parties conducted an unprecedented paid media campaign to provide notice to class members. Television advertising, consisting of a 30-second notice advertisement, was conducted in two stages. The first stage consisted of 160 televised advertisements shown on national broadcast and cable networks in the United States from August 22, 1994 to September 18, 1994. In addition, 46 advertisements were shown on Spanish-language television networks in the United States from August 22, 1994 to August 31, 1994. The second stage of televised advertisements consisted of 2,859 advertisements in 72 media markets chosen for the likely concentration of class members in those areas between September 19, 1994 and October 2, 1994. Third Kinsella Aff. at ¶ 10.

432. The Court-appointed English-language newspaper notice advertisement was published in 286 newspapers in 151 markets primarily on August 28, 1994. Tr. at 806. In a second round of newspaper advertising, the notice advertisement was published in 171 newspapers in the same 72 specially selected media markets that were used in the second round of television advertisements. Newspaper advertisements were also published in 29 Spanish-language newspapers between August 22, 1994 and September 1, 1994. Continental Exh. 12; Tr. at 806-07. In addition, the newspaper notice was translated into ten foreign languages and was published in 57 newspapers in 21 foreign countries. Third Kinsella Aff. at ¶ 8.

433. Court-approved notice materials were also published in USA Weekend, Parade Magazine, American Association of Retired Persons Bulletin, and numerous union and trade publications. Continental Exh. 12; Tr. at 808. USA Weekend and Parade have a combined circulation of approximately 100 million people. The American Association of Retired Persons Bulletin reaches 22 million people. Tr. at 808. The labor publications have a total circulation of over 2 million people. Tr. at 809.

434. The notice campaign also focused on specifically providing notice to members of the Global Third-Party Claimant Class. For example, notice packages were directly mailed to all entities that had been co-defendants in litigation with Fibreboard, to approximately 6,500 companies involved in shipbuilding, oil and gas refining and exploration, and to thousands of insurance carriers. Tr. at 811-12. In addition, notice advertisements were published in The Wall Street Journal, Business Week and numerous business and trade journals designed to reach members of the Global Third-Party Claimant Class. Tr. at 808-10.

435. The notice dissemination plan carried out in this action cost between $18 million and $20 million, and was the most expensive paid notice campaign ever conducted in the United States. Tr. at 814, 815. The notification plan in this action was more extensive than that approved and conducted in the Manville bankruptcy proceedings and in the Georgine class action. Tr. at 814-15. Ms. Kinsella estimated, for example, that the televised notices alone reached approximately 94.2% of television households in the United States an average of 5.1

times each.[39] Tr. at 80405. In total, more than 1.4 million notice packages were distributed. Tr. at 814.

436. This Court incorporates herein as reliable the reports submitted to the Court by the Settling Parties regarding implementation of the notification plan. The Court likewise finds the testimony of Ms. Kinsella to be credible and reliable. No objector or any other person or party has presented any credible rebuttal to the Settling Parties' evidence regarding implementation of the notice dissemination plan.

437. None of the formal objections to the settlements herein that were filed by the Ortiz Intervenors and the Flanagan Intervenors related to the adequacy of the notice or the notice dissemination plan. Ortiz Intervenors' Objections to the Proposed Settlement, Dkt. No. 396 (Oct. 31, 1994); Ortiz Intervenors' Amended Objections, Dkt. No. 464 (Nov. 26, 1994); Objections to the Proposed Global Settlement by the Maritime Intervenors, Dkt. No. 395 (Oct. 31, 1994).

438. Several individuals filed objections that related to the notice of the notice dissemination plan. Timothy P. Dowling asserted that the notice document is deficient on the grounds that it: (i) does not express the likelihood that the insurers will prevail in the Coverage Case appeal in terms of a percentage; (ii) does not indicate the amount of the fees that will be actually paid by the insurers to counsel for the Global Health Claimant Class, nor the number of hours devoted to this matter by such counsel; and (iii) does not adequately explain the nature

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[39] 98.2% of households in the United States have televisions. Tr. at 805.

of the claims and expenses that may be paid from the settlement funds. Objection of Timothy P. Dowling to Global Class Settlement, Dkt. No. 419 (Nov. 10, 1994), at 4-6. This Court finds Mr. Dowlings' objections to be without merit because: (i) there is no need, and it would be inappropriate, for this Court to approve a notice that speculated upon the probable outcome of contested litigation in another court; (ii) fees to be paid to Plaintiffs' Counsel have not yet been determined and hence could not be set forth in the notice; and (iii) the notice accurately and adequately describes the claims and expenses payable from the settlement funds.

439. Mark E. Nelson, on behalf of himself and his minor son, asserted three complaints with regard to the notice dissemination efforts: (i) Mr. Nelson experienced some difficulty in obtaining copies of the Global Settlement Agreement, Third-Party Claimant Class Settlement Agreement and Trilateral Settlement Agreement; (ii) allegedly inadequate efforts were made to provide notice to security guards; and (iii) notice packages, including copies of the settlement agreements, should have been sent to "every residence in every country where Fibreboard asbestos has been distributed." Amended Objections and Petition to Intervene, Dkt. NO. 516 (Dec. 1, 1994), at 2-3. This Court finds Mr. Nelson's complaints do not warrant disapproval of the settlement because: (i) Mr. Nelson in fact received the notice materials; (ii) adequate efforts were made to provide notice to security guards, and security guards are not in a materially different position from other Global Health Claimant Class members with respect to their ability to receive notice; and (iii) it would have been impractical and unnecessarily costly to send copies of the notice materials to

every residence in the numerous countries where Fibreboard asbestos may have been present.

440. Finally, Charles Linder Floyd appears to object on the ground that the notice was provided through the "White controlled media." Motion to Intervene, Dkt. No. 390 (Oct 4, 1994), at 2. Mr. Floyd's objection assumes that persons other than white persons -- and, in particular African-Americans -- did not receive adequate notice through the means described in Ms. Kinsella's affidavits and her testimony. Because there is no support for such an assumption, this Court rejects Mr. Floyd's objection.

441. On December 21, 1994, the Settling Parties moved this Court for approval of a supplemental notice entitled "Supplemental Notice of Class Action, Global Settlement and Third-Party Claimant Class Settlement and Hearing" (the "Supplemental Notice"), containing a description of the Longshore Settlement, a clarification of the operation of the Global Settlement class definitions, and a description of certain amendments to the Global Settlement Agreement and related documents. At the same time, the Settling Parties moved for approval of a plan for the dissemination of the Supplemental Notice. Joint Motion of the Settling Parties for Approval of Supplemental Notice and Notification Plan, Dkt. No. 581 (Dec. 21, 1994). On December 22, 1994, this Court approved the Supplemental Notice and the plan for its dissemination. Order Approving Supplmental Notice and Notification Plan, Dkt. No. 583 (Dec. 22, 1994).

442. Pursuant to the notification plan, the Supplemental Notice was mailed to all potential members of the

Global Health Claimant Class and Global Third-Party Claimant Class who were directly mailed the original Notice of Class Action, Global Settlement, Third-Party Claimant Class Settlement and Hearing. In addition, the Supplemental Notice was mailed to all organizations that are not Global Third-Party Claimant Class members that were directly sent the original notice document. In total, 1,513,018 copies of the Supplemental Notice were mailed. Notification Plan Directed to All Parties in Connection with the Longshore and Harbor Workers' Compensation Act and Ahearn, et al., v. Fibreboard Corporation, Dkt. No. 580 (Dec. 21, 1994); Affidavit of Katherine Kinsella, sworn to February 1, 1995, Dkt. No. 714; Certificate of Compliance With Order Approving Notice, Dkt. No. 711 (Feb. 1, 1995).

443. The Settling Parties also moved this Court on December 21, 1994 for approval of a separate notice entitled "Notice of Class Action, Settlement and Hearing" (the "Longshore Notice"), containing a detailed description of the Longshore Settlement. At the same time, the Settling Parties moved for approval of a plan for the dissemination of the Longshore Notice. Joint Motion of the Settling Parties for Preliminary Approval of Class Action Settlement, for Approval of Notice to the Class and for Scheduling of Final Fairness Hearing, Dkt. No. 578 (Dec. 21, 1994). On December 22, 1994, this Court approved the Longshore Notice and the plan for its dissemination. Order Preliminarily Approving Class Action Settlement, Approving Notice to the Class and Scheduling a Final Fairness Hearing, Dkt. No. 584 (Dec. 22, 1994).

444. Pursuant to the notification plan, 11,263 copies of the Longshore Notice, together with the Longshore Stipulation of Settlement, were mailed to potential members of the Longshore Defendant Class who had previously been identified and to whom the Global Settlement notice package was sent. In addition, efforts were made to identify other members of the Longshore Defendant Class. As a result of these efforts, 12,280 copies of the Longshore Notice and Longshore Stipulation of Settlement, together with the Global Settlement notice package, were distributed. Notification Plan Directed to All Parties in Connection with the Longshore and Harbor Workers' Compensation Act and Ahearn, et al. v. Fibreboard Corporation, Dkt. No. 580 (Dec. 21, 1994); Affidavit of Katherine Kinsella, sworn to February 1, 1995, Dkt. No. 714; Certificate of Compliance With Order Approving Notice, Dkt. No. 711 (Feb. 1, 1995).

445. On February 2, 1995, at the hearing upon the Longshore Settlement in this Court, the Director suggested that the Longshore Defendant Class definition be clarified to apply specifically as well to Longshore employers that provided benefits under so-called "LHWCA Extensions" -- federal statutes that incorporate and apply LHWCA's provisions to certain other categories of employees.[40] In response to the Director's suggestion, the parties both clarified the definition and distributed a second round of notice to all 23,000 entities who previously were provided notice of the Longshore

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[40]The "LHWCA Extensions" are the Defense Base Act, 42 U.S.C. §§ 1651, et seq., the District of Columbia Workmen's Compensation Act, 26 D.C. Code §§ 501, et seq., the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331, et seq., and the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §§ 171, et seq.

Settlement. Affidavit of Peter Van N. Lockwood, sworn to February 8, 1995, at ¶¶ 3, 7.

446. In sum, this Court finds that the notice materials used in this class action, and the dissemination thereof, were more than sufficient to supply to factual predicate necessary to comply with the requirements of Fed. R. Div. P. 23 and due process. The evidence in the record amply demonstrates that extensive and massive notice of this class action and the proposed settlement was given to class members.

Signed this 27th day of July, 1995.

Circuit Judge Robert M. Parker
Circuit Court Judge
United States Court of Appeals
Fifth Circuit
Sitting By Designation

(4)
Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1997

ESTEBAN ORTIZ, ET AL.,
Petitioners

v.

FIBREBOARD CORPORATION, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME III (Pp. 469 - 626)

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APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

GERALD AHEARN, JAMES DENNIS, CHARLES W. JEEP, JAMES ELLISON and WILLIAM JAMES MITCHELL, on Behalf of Themselves and Others Similarly Situated,
Plaintiffs
v.
FIBREBOARD CORPORATION and BETHLEHEM STEEL CORPORATION
Defendants,

CONTINENTAL CASUALTY COMPANY, CNA CASUALTY COMPANY OF CALIFORNIA, COLUMBIA CASUALTY COMPANY and PACIFIC INDEMNITY COMPANY, Defendant-Intervenors.

OWENS-ILLINOIS, INC., on Behalf of Itself and Others Similarly Situated,
Additional Counterclaim Defendant.

: Civil Action
: No. 6:93cv526

CONCLUSIONS OF LAW

July 27, 1995

CONCLUSIONS OF LAW

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CONCLUSIONS OF LAW

Based in part on the foregoing findings of fact, the Court makes the following conclusions of law.[1]

I. SUBJECT-MATTER JURISDICTION

A. There is a case or controversy

1. There is a justiciable case or controversy so long as there is an "actual antagonistic assertion of rights." United States v. Johnson, 319 U.S. 302, 305 (1943). A controversy exists until "'the issues presented are no longer "live,"'" or "the parties lack a legally cognizable interest in the outcome." Chevron U.S.A., Inc. v. Traillour Oil Co., 987 F.2d 1138, 1153 (5th Cir. 1993) (quoting Powell v. McCormack, 395 U.S. 486, 496 (1969)). The case-or-controversy requirement is met so long as the Court's ruling will affect "tangible legal rights," ASARCO Inc. v. Kadish, 490 U.S. 605, 619 (1989), and the parties do not call upon the Court merely to render an advisory opinion or to opine "what the law would be on an uncertain or hypothetical state of facts." Id. (quoting Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249, 262 (1933)).

2. This matter presents an active "Case" or "Controversy." There is an "actual antagonistic assertion of rights" between and among the parties to this action, see Findings of Fact at ¶¶ 1-5; and the Court's ruling will affect their "tangible legal rights" by, inter alia, finally resolving Fibreboard's

[1]To the extent the following conclusions of law include findings of fact or mixed findings of fact and conclusions of law, those findings are hereby adopted by this Court.

coverage dispute with Continental and Pacific, enabling the claimant Class to secure access to substantial insurance proceeds and releasing Fibreboard, Continental and Pacific from asbestos-related personal-injury lawsuits. See Findings of Fact at ¶¶ 190-95.

3. That an agreement in principle to settle this action was reached before the complaint was filed does not alter the Court's conclusion. Courts routinely assert jurisdiction over class action settlements and consent decrees filed the very day the related suits are filed. See, e.g., In re Joint Eastern and Southern Dist. Asbestos Litigation ("Manville"), 982 F.2d 721, 728-29 (2d Cir. 1992), modified on other grounds, 993 F.2d 7 (2d Cir. 1983); Carlough v. AmchemProds., Inc., 834 F. Supp. 1437, 1465 (E.D. Pa. 1993), aff'd, 10 F.3d 189 (3d Cir. 1993); see also Swift & Co. v. United States, 276 U.S. 311, 326 (1928); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 833-34 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976). Here, the settlement agreement was not signed until approximately four months after the complaint was filed, and after the parties had negotiated vigorously about its terms and the terms of the Trilateral.

4. The case or controversy requirement is met even though numerous Class members are currently unimpaired. Numerous courts have certified classes that include future claimants. See, e.g., In re Agent Orange Product Liability Litigation (Ivy), 996 F.2d 1425 (2d Cir. 1993), cert. denied, 114 S. Ct. 1125; Georgine v. Amchem Prods., Inc., 157 F.R.D. 246 (E.D. Pa/ 1994); In re Joint Eastern and Southern Dist. Asbestos Litigation, 133 F.R.D. 425 (E.D.N.Y. 1990). Further, numerous courts have certified class actions that

include people with no manifest symptoms or injury. See, e.g., In re Silicone Gel Breast Implant Products Liability Litigation (MDL-926), No. CV 92-P-10000-S, 1994 WL 114580 (N.D. Ala. Apr. 1, 1994); In re Joint Eastern and Southern Dist. Asbestos Litigation, Nos. 90-3973; 90-7518, slip op. at 194-96 (E. & S.D.N.Y. Dec. 15, 1994).

B. The amount-in-controversy requirement

5. For diversity jurisdiction to exist, the amount-in-controversy requirement allegations of damage in excess of $50,000 -must be satisfied. 28 U.S.C. § 1332(a). In determining the amount in controversy, "the sum claimed by the plaintiff controls . . . [unless it] appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount." St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938) (emphasis added]. Although the plaintiffs bear the burden of proving the requisite amount in controversy, see Gibbs v. Buck, 307 U.S. 66, 72 (1939); McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936), this burden is not a heavy one, and the plaintiff need demonstrate only that it is not impossible that he or she will recover more than $50,000. See Seafoam, Inc. v. Barrier Systems, Inc., 830 F.2d 62, 66 (5th Cir. 1987) ("It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal."). In determining the amount in controversy, claims for punitive damages must be included in the computation. See Bell v. Preferred Life Assur. Soc., 320 U.S. 238, 240 (1943).

6. The amount-in-controversy requirement is satisfied because each Class member could lawfully allege

damages in excess of $50,000. The amount-in-controversy requirement may be satisfied in mass-tort class actions, including class actions consisting partly or entirely of people who had not, at the time of filing, manifested any symptoms, illness or injury. See, e.g., Manville, supra, 982 F.2d at 734 (asbestos: amount in controversy requirement satisfied although some members were "exposure only"); Carlough v. Amchem Prods. Inc., supra, 834 F. Supp. at 1456-62 (asbestos: same); In re A.H. Robins Co., Inc., 880 F.2d 709, 724-25 (4th Cir.) (Dalkon Shield: "indisputable that it cannot be said to a 'legal certainty' that the jurisdictional amount herein was not satisfied" where the class included women who had used the shield but who had not yet manifested an injury), cert. denied, 493 U.S. 959 (1989); In re Agent Orange Product Liability Litigation, supra, 996 F.2d at 1434 (Agent Orange); Payton v. Abbott Labs, 83 F.R.D. 382, 395 (D. Mass. 1979) (DES), vacated on other grounds, 100 F.R.D. 336 (D. Mass. 1983); Bowling v. Pfizer, Inc., 143 F.R.D. 141, 167 (S.D. Ohio 1992) (defective artificial heart valves), app. dismissed without op., 995 F.2d 1066 (1993).

7. Even if each class member could not meet the amount-in-controversy requirement, the Court would still have subject matter jurisdiction over this diversity case under the Judicial Improvement Act of 1990, 28 U.S.C. § 1367, because the class representatives meet the amount-in-controversy requirement, and therefore all other class members fall within this Court's supplemental jurisdiction, regardless of the value of their claims. In re Abbott Laboratories, 51 F.3d 524 (5th Cir. 1995).

8. Even if each class member could not meet the amount-in-controversy requirement, and even if the class

members did not fall within this Court's supplemental jurisdiction, the amount-in-controversy requirement would still be satisfied for all class members because it is appropriate to aggregate the amounts of the Class members' claims to satisfy the $50,000 jurisdictional amount requirement. The class members share the right to an equitable distribution of the limited resources available to redress their personal injury claims against Fibreboard. See Snyder v. Harris, 394 U.S. 332, 335 (1969). Aggregated, the claims clearly exceed $50,000.

9. That certain jurisdictions do not permit causes of action absent physical injury or limit punitive or other damages in some circumstances does not mean that unimpaired Class members could not lawfully allege damages in excess of $50,000 for such causes of action as medical monitoring, fear of cancer and risk of cancer. A Class member residing in jurisdictions where such causes of action could not be asserted could, for example, bring his or her action in another jurisdiction (such as California, which has personal jurisdiction over Fibreboard) where the causes of action and damages are permitted; make a good faith argument for application of the law or a jurisdiction where the causes of action and damages are permitted; or make a good faith argument for the extension and change of the law. The Court cannot say "to a legal certainty" that such claims -- including their punitive damages component -- are worth less than $50,000.

C. The Insurers' standing to intervene

1. Intervention as of right

10. An applicant must satisfy four requirements to intervene pursuant to Rule 24(a): "(1) the application for intervention must be timely; (2) the applicant must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; (4) the applicant's interest must be inadequately represented by the existing parties to the suit." New Orleans Public Service, Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 463 (5th Cir.) (en banc) (internal quotations omitted), cert. denied, 469 U.S. 1019 (1984). The Insurers have met each of these requirements. Kneeland v. National Collegiate Athletic Ass'n, 806 F.2d 1285, 1289 (5th Cir.), cert. denied, 484 U.S. 817 (1987); Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1124 (5th Cir.), cert. denied, 400 U.S. 878 (1970); Campbell v. Plank, 113 F.R.D. 175, 176 (D. Kan. 1990); Levenfeld v. Clinton, 674 F. Supp. 255, 257, 262 (N.D. Ill. 1987); Roach v. Churchman, 457 F.2d 1101, 1102 (8th Cir. 1972).

2. Permissive intervention

11. Rule 24(b)(2) authorizes permissive intervention in the Court's discretion when "an [intervention] applicant's claim or defense and the main action have a question of law or fact in common," and provides that the court must consider "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." In

considering these factors, the Court concludes the Insurers' permissive intervention is appropriate.

II. CERTIFICATION OF THE HEALTH CLAIMANT CLASS

A. Standards for Class Certification

12. A class may be certified if all four prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure are met and one or more of the provisions of Rule 23(b) is satisfied. "The district court has wide discretion in deciding whether or not to certify a proposed class." Jenkins v. Raymark Industries, Inc., 782 F.2d 468, 471-72 (5th Cir. 1986).

13. The Rule 23 requirements apply to all federal class actions; however, they are often more readily satisfied in the settlement context because the issues for resolution by the Court are more limited than in the litigation context. See In re A.H. Robins Co., Inc., 85 B.R. 373, 378 (E.D. Va. 1988), aff'd, 880 F.2d 709 (4th Cir. 1989); Officers for Justice v. Civil Service Com'n of City and County of San Francisco, 688 F.2d 615, 633 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983); In re Dennis Greenman Securities Litigation, 829 F.2d 1539, 1543 (11th Cir. 1987); Bowling, supra, 143 F.R.D. at 158; see also 2 Newberg on Class Actions § 11.28 (3rd ed. 1992); but see In re General Motors Corporation, ___F.3d___, 1995 WL 223209, 63 U.S.L.W. 2659 (3rd Cir. 1995) (rejecting liberalized criteria for settlement classes). Courts have approved settlements and finally certified settlement classes while at the same time holding that class certification for litigation purposes might be improper. See, e.g., Officers for Justice, supra, 688 F.2d at 633; In re Anthracite Coal Antitrust Litigation, 79 F.R.D. 707, 713-14 (M.D. Pa. 1978) (court approved class settlement while noting that certification for litigation purposes would be doubtful), aff'd in part mem. and vacated in part mem. sub nom. Colonial Fuel Co. v. Blue Coal Corp., 612 F.2d 571 (3d Cir. 1979) (table); Wilkes-Barre Steam Heat Co. v. Blue Coal Corp., 612 F.2d 576 (3d Cir. 1979)(table).

B. Rule 23(a) prerequisites

14. Rule 23(a) provides that a class action may be brought if: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

1. Numerosity

15. The numerosity requirement of Rule 23(a) is satisfied. Given the size of the class (Findings of Fact at ¶ 278) joinder of the class members' claims would plainly be impracticable. See Boykin v. Georgia-Pacific Corp., 706 F.2d 1384, 1386 (5th Cir. 1983), cert. denied, 465 U.S. 1006 (1984) (317-member class met numerosity requirement).

2. Commonality

16. Rule 23(a) requires that there be at least one legal or factual issue common to all class members. See 3B

J. Moore and J. Kennedy, Moore's Federal Practice ¶ 23.06-1, at 23-159-23-160 (2d ed. 1993); Jenkins, supra, 782 F.2d at 472 ("The threshold of commonality is not high," as "the Rule requires only that resolution of the common questions affect all or a substantial number of the class members"); Walker v. Jim Dandy Co., 638 F.2d 1330, 1336 (5th Cir. 1981). The commonality requirement may be more readily satisfied in the settlement context than in the litigation context. See Conclusions of Law at ¶ 13.

17. There are questions of law and fact common to the class. All Class members here have an overriding common interest in eliminating the risk posed by the coverage litigation and creating a substantial fund of insurance proceeds to provide compensation for Class members. Findings of Fact ¶¶ 4, 34, 54, 57, 225, 278, 346. Consequently, many major issues presented by the Class are common to all of its members, including whether claimants against Fibreboard have a right to substantial insurance proceeds notwithstanding the existence of a coverage dispute; and whether some curtailment of the Class's rights in the tort system is appropriate in order to enable a resolution of the coverage dispute that equitably distributes substantial insurance proceeds. See Georgine, supra, 157 F.R.D. at 316; 2 Newberg on Class Actions § 11.28, at 11-58-11-60. See also Jenkins, supra, 782 F.2d at 473 (affirming class certification of limited issues including liability but not damage and causation).

2. Typicality

18. "The 'typicality' requirement focuses . . . on the similarity of the legal and remedial theories behind [the

named and unnamed plaintiffs'] claims." Jenkins, supra, 782 F.2d at 472. Consequently, in the settlement context, it "requires proof that the interests of the class representatives and the class are commonly held for purposes of receiving similar or overlapping benefits from a settlement." 2 Newberg on Class Actions § 11.28, at 11-58; see also Conclusions of Law at ¶ 13 (typicality more readily satisfied in the settlement context). The requirement may be met even though "[t]he degree of harm may differ between the representatives and members of the class according to the degree of exposure (if any), the effects of the asbestos disease process, and the nature of the disease contracted by the individual." Jenkins v. Raymark Indus., Inc., 109 F.R.D. 269, 272 (E.D. Tex. 1985), aff'd, 782 F.2d 468 (5th Cir. 1986); see also Ladd v. Dairyland County Mut. Ins. Co. of Tex., 96 F.R.D. 335, 337 (N.D. Tex. 1982). The legal and remedial theories of the representative plaintiffs are typical of the Class. All Class members' claims arise from exposure to asbestos for which Fibreboard may bear legal liability, and all have a common interest in eliminating the common risk posed by the coverage litigation and securing the maximum possible insurance proceeds. See Jenkins, supra, 782 F.2d at 472.

4. Adequacy of Representation

19. The adequacy requirement contains two elements: "The first concerns the qualifications of counsel, and the second concerns the relationship between the interests of the class representatives and the interests of the other class members." Jenkins, supra, 109 F.R.D. at 273.

a. Class Counsel

20. Class Counsel are highly competent, skilled and experienced members of the plaintiffs' asbestos bar and were exceedingly well qualified to serve as Class Counsel in this case. Findings of Fact at ¶¶ 293-97. As set forth more fully below, Class Counsel adequately represented the class. See Conclusions of Law at ¶¶ 60-68.

b. Class representatives

21. Class representatives satisfy the adequacy requirement unless they have "an insufficient stake in the outcome or interests antagonistic to the unnamed members." Jenkins, supra, 782 F.2d at 472; see also Georgine, supra, 157 F.R.D. at 317 ("The key question is whether their interests are antagonistic.") (quoting Steiner v. Equimark Corp., 96 F.R.D. 603, 610 (W.D. Pa. 1983)) (emphasis in original). And "so long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not antagonistic for representation purposes." In re Corrugated Container Antitrust Litigation, 643 F.2d 195, 208 (5th Cir. 1981).

22. The Court concludes that the Class representatives have a sufficient stake in the outcome and that the interests of the Class representatives and the members of the class are not antagonistic. The Class representatives span the range of the various medical categories under the Trust Distribution Process and include both already-impaired and not-yet-impaired claimants. Findings of Fact at ¶¶ 279-88. The class representatives and the members of the class -- all of whom are

equally at risk in the coverage litigation -- are united in seeking the maximum possible recovery for their asbestos-related claims. See Jenkins, supra, 109 F.R.D. at 274.

23. The class representatives adequately represent those Class members whose injuries have not yet become manifest. The Complaint is expressly brought on behalf of unimpaired Class members; and unimpaired Class members have interests in the global settlement common with each of the Class representatives and are united with them in eliminating the risk of the coverage litigation by seeking the maximum possible settlement for the entire Class. Findings of Fact at ¶¶ 346, 361.

24. The Class representatives played a sufficient role in the action, notwithstanding that they were named after the agreement in principle was reached and that they relied on Class Counsel in the subsequent settlement negotiations. See Findings of Fact at ¶¶ 279-88. "It is not a requirement that representative plaintiffs have specific knowledge of the claims and issues in the action, or that they play a personal role in the direction and management of the action." Georgine, supra, 157 F.R.D. at 317. See Longden v. Sunderman, 123 F.R.D. 547, 559 (N.D. Tex. 1988) (the law well recognizes that, in "complex" matters, "it is unreasonable to expect the class representatives to possess detailed, personal knowledge"); Gibb v. Delta Drilling Co., 104 F.R.D. 59, 77 (N.D. Tex. 1984). "[T]he primary criterion for determining whether the class representative has adequately represented the class . . . is whether the representative through qualified counsel, vigorously and tenaciously protected the interests of the class." Gonzales v. Cassidy, 474 F.2d 67, 75 (5th Cir. 1973) (emphasis

added); accord Sunderman, supra, 123 F.R.D. at 559); Durrett v. John Deere Co., 150 F.R.D. 555, 558 (N.D. Tex. 1993).

C. Certification of the Class under Rule 23(b)(1)(B)

1. The history of mandatory class actions in federal court

25. The federal courts have traditionally employed mandatory class actions to achieve, through a unitary resolution, equitable distribution of assets in which large numbers of claimants have a "common interest." eg., Smith v. Swormstedt, 57 U.S. (16 How.) 288, 302-03, 309 (1854); Hartford Life Ins. Co. v. Ibs, 237 U.S. 662, 670-72 (1915); see also, e.g., Leadville Coal Co. v. McCreery, 141 U.S. 475, 478 (1891); Dickinson v. Burnham, 197 F.2d 973, 980 (2d Cir. 1952).

26. Judgments in class actions seeking equitable distribution of assets in which all claimants share a "common interest" are binding on all class members, even though class members' claims are a collection of money damage claims, and even though many of the class members lack any connection with the forum court. Smith, supra, 57 U.S. at 300-03; Ibs, supra, 237 U.S. at 672; see also Leadville, supra, 141 U.S. at 478; Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 367 (1921).

27. The Supreme Court and federal appellate courts have consistently upheld traditional mandatory class actions of this and related nature, provided the absent class

members were adequately represented. See e.g., Hansberry v. Lee, 311 U.S. 32 (1940); Sovereign Camp of the Woodmen of the World v. Bolin, 308 U.S. 66, 78-79 (1938); Supreme Tribe of Ben Hur, supra; Hartford Life Insurance Co. v. Barber, 245 U.S. 146, 149 (1917); Supreme Council of the Royal Arcanum v. Green, 237 U.S. 531, 542-43 (1915); see also Kincade v. General Tire and Rubber Co., 635 F.2d 501, 506-08 (5th Cir. 1981); Robertson v. National Basketball Ass'n, 556 F.2d 682, 685-86 (2d Cir. 1977); see also Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313-14 (1950) (in suit for judicial settlement of accounts, the need for a unitary and final adjudication "[could] be served only if interests or claims of individuals who are outside of the State could somehow be determined" and, hence, "[a] construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified") (emphasis added).

28. The rules of procedure applicable in the federal courts have long endorsed the traditional role of mandatory class actions in achieving equitable distribution of assets among multiple claimants.

(a) In the years prior to the adoption of the Federal Rules of Civil Procedure, Federal Equity Rule 38 (adopted in 1912), under which "[l]imited fund and other no opt-out class actions were recognized," provided that "'absent parties could be bound by . . . judgments pursuant to this provision.'" 1 Newberg on Class Actions, supra, §1.09 at 1-24 (quoting In re Joint Eastern and Southern Dist. Asbestos Litigation ("Manville"), 129 B.R. 710, 804 (E. & S.D.N.Y. 1991), vacated on other grounds, 982 F.2d 721 (2d Cir. 1992), modified, 993 F.2d 7 (2d Cir. 1993)).

(b) Original Rule 23 (contained in the 1938 version of the Federal Rules of Civil Procedure) preserved the binding nature of traditional class actions, including those seeking equitable distribution of assets. In addition, Rule 23 for the first time extended the class-action mechanism to actions at law, and in doing so created a new category of nonbinding class action. The Rule thus distinguished among three types of actions: "true," "hybrid," and "spurious." The first two of these categories were mandatory -- i.e., they encompassed the traditional binding, no-opt-out class actions recognized by the case law; the third, "spurious" category, was essentially a permissive joinder device, binding class members only if they affirmatively opted into the class. 1 Newberg on Class Actions, supra, § 1.09 at 1-26 1-27; 3B James Moore & John E. Kennedy, Moore's Federal Practice ¶ 23.31[1], at 23-235 (1992); see also Dickinson, supra, 197 F.2d at 979-80 (class actions seeking equitable distribution of assets were binding, or mandatory, under the 1938 version of Rule 23).

(c) The 1966 amendments to Rule 23 promulgating the current form of Rules 23(b)(1) and 23(b)(2) preserved the "true" and "hybrid" categories in slightly modified form. Those sections of the Rule accordingly encompass traditional class actions and preserve their mandatory, non-opt-out quality. "Spurious" actions, by contrast, were replaced by the present Rule 23(b)(3) "common question" class action. See Marvin E. Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39, 43 (1967); 3B Moore's Federal Practice, supra, ¶ 23.31[1], at 23-235; see also 1 Newberg on Class Actions, supra, § 1.09 at 1-25 ("Antecedents of the modern limited fund class action may be found in the hybrid class suit [under prior Rule 23].").

29. Class actions certified pursuant to Rules 23(b)(1) and 23(b)(2) are thus predominantly equitable in nature. See 1 Newberg on Class Actions, supra, § 1.19 at 1-46. For example, as to cases under subdivision (b)(1)(B): "though they involve money claims individually," such cases are in essence actions "to allocate pro rata an available fund that is insufficient to pay all claims," and therefore "are equitable in nature," id. § 1.18 at 1-47. See also, e.g., Manville at 832.

2. Application of Rule 23(b)(1)(B)

30. Rule 23(b)(1)(B) calls for certification of a mandatory class if the prerequisites of Rule 23(a) are met and:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of. . .
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

31. This Rule is to be interpreted according to its "plain meaning." See, e.g., Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 123 (1989). As used in the Rule, the requisite "risk" of impairment need not be a certainty

or even a better-than 50% likelihood. Instead, the term "risk" refers only to a "substantial probability," which has been described as "more than a mere possibility" but "less than a preponderance." Manville, supra, 129 B.R. at 765; accord In re Granada Partnership Securities Litigation, 803 F. Supp. 1236, 1244 (S.D. Tex. 1992); In re Joint Eastern and Southern Dist. Asbestos Litigation ("Eagle-Picher"), 134 F.R.D. 32, 35 (E. & S.D.N.Y. 1990); In re First Commodity Corp. of Boston Customer Account Litigation, 119 F.R.D. 301, 312 (D. Mass. 1987); Jenkins, supra, 109 F.R.D. at 276-77; In re Jackson Lockdown/MCO Cases, 107 F.R.D. 703, 713 (E.D. Mich. 1985); In re "Agent Orange" Product Liability Litigation, 100 F.R.D. 718, 726 (E.D.N.Y. 1983), aff'd, 818 F.2d 145 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988).

a. Risk resulting from the coverage litigation

32. If separate actions by Class members were permitted, there would be a risk that early individual adjudications would consume all available assets, and that Class members who won the race to the courthouse would achieve recoveries denied to thousands of later claimants. That risk would exist whether the coverage litigation were to proceed or whether the Trilateral Agreement were approved. Findings of Fact at ¶¶ 225-30, 233-36, 238, 274.

33. The risk that available funds could be inadequate to pay all claims constitutes a risk of "substantial[] impair[ment]" under rule 23(b)(1)(B). The need to protect Class members' "common interests" in the insurance proceeds subject to the coverage dispute demands a unitary resolution

permitting equitable distribution; mandatory class certification is thus appropriate for the same reasons as have been invoked throughout history. Conclusions of Law ¶¶ 25-29, and cases cited therein. Numerous courts applying Rule 23(b)(1)(B) have certified classes under the Rule where allowing separate actions would have crated a risk that early individual adjudications would have exhausted all available assets.[2]

34. Rule 23(b)(1)(B) certification does not require a fixed asset or piece of property in which all class members have a preexisting interest. See, e.g., In re Drexel Burnham Lambert Group, Inc., 130 B.R. 910, 920 (S.D.N.Y. 1991) and 960 F.2d 285, 292 (2d Cir. 1992); In re Silicone Gel, supra; In re Granada, supra, 803 F. Supp. at 1244; County of Suffolk, supra, 710 F. Supp. at 1418; Eagle-Picher, supra, 134 F.R.D. at 34; Coburn, supra, 77 F.R.D. at 45. See also Newburg on Class Actions, supra, §17.15A at 3S-27-28.

35. The Global Settlement resolves both the insurance coverage dispute between Fibreboard and the insurers,

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[2] See, e.g., Manville, supra, 982 F.2d 721, 738-39 (2d Cir. 1992); In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 292 (2d Cir. 1992), cert. dismissed, 113 S. Ct. 1070 (1993); In re Silicon Gel Breast Implant Products Liability Litigation (MDL) 926), CV 93-P-11433-S (N.D. Ala., June 1, 1993); In re Granada Partnerships Securities Litigation, 803 F. Supp. 1236, 1244 (S.D. Tex. 1992); Eagle-Picher, supra, 134 F.R.D. at 35; County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407, 1418 (E.D.N.Y. 1989), aff'd, 907 F.2d 1295 (2d Cir. 1990); Bush v. Rewald, [1986-87 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,999 (D. Haw., Sept. 4, 1986); In re Jackson Lockdown/MCO Cases, 107 F.R.D. 703, 712-13 (E.D. Mich. 1985); Coburn v. 4-R Corp., 77 F.R.D. 43, 45-46 (E.D. Ky. 1977). See also Jenkins v. Raymark Indus., Inc., 109 F.R.D. 269, 276 (E.D. Tex. 1985), aff'd, 782 F.2d 468 (5th Cir. 1986) ((b)(1)(B) certification is appropriate where "the brink of insolvency will be reached during the litigation").

and the claims of all class members against Fibreboard and the insurers. The Global Settlement involved a uniquely situated defendant in a mass tort that has created unparalleled problems for the courts and the litigants. The Global Settlement resulted from a unique set of circumstances not likely to be repeated. Findings of Fact at ¶¶ 269-72. Resolution of the insurance dispute required a unitary settlement in a proceeding in which all claims were compromised. On these facts, allowance of individual adjudications by class members would have destroyed the opportunity to compromise the insurance coverage dispute by creating the settlement fund, and would have exposed the class members to the very risks that the settlement addresses -- a situation that falls squarely under Rule 23(b)(1)(B). See In re Jackson Lockdown, 107 F.R.D. at 708, 712; In re A.H. Robins, 85 B.R. at 380.

36. Whether mandatory class certification is appropriate in the typical case where a class action is settled with a defendant's own funds, or with insurance funds that are not the subject of genuine and vigorous dispute, is not at issue in this case. In such a case, if the settlement failed because separate actions were permitted, the defendant would retain the settlement funds (or the insurance coverage), and, provided that the defendant had adequate funds to pay all class members' claims, there might be no "impair[ment]," substantial or otherwise, to class members' "ability to protect their interests." Instead, the class members could go out and secure whatever is their due through litigation. The destruction of the settlement fund here, in contrast, constitutes a "risk" within the meaning of rule 23(b)(1)(B) because the source of that fund (and any meaningful recovery for the Class) is a non-defendant whose obligations are seriously in doubt and may well disappear

entirely if the settlement were to fall through -- with the result that Class members could then not secure their due through litigation.

b. Limited fund

37. A class may be certified under Rule 23(b)(1)(B) irrespective whether a "limited fund" may be said to exist. See White v. National Football League, 822 F. Supp. 1389, 1411 (D. Minn. 1993), aff'd on other grounds, 41 F.3d 402 (8th Cir. 1994); Specialty Cabinets & Fixtures v. American Equitable, 140 F.R.D. 474, 477 (S.D. Ga. 1991). Because separate actions would create a risk of "substantial[] impair[ment]" to Class members, it is not necessary for the Court to analyze the case in terms of the existence of a "limited fund."

38. Alternatively, the disputed insurance asset liquidated by the $1.535 billion Global Settlement may be viewed as a "limited fund" requiring equitable distribution through mandatory class certification under rule 23(b)(1)(B). That "limited fund" resulted from incontrovertibly arms'length bargaining that liquidated the insurance coverage, which was subject to massive, protracted and on-going litigation. Findings of Fact at ¶¶ 36-47, 89-181, 203. See, e.g., In re A.H. Robins, supra, 880 F.2d at 741 (settlement of coverage dispute "creat[ed] a fund in which all [class members] would have a common interest. This is the classic type of 'limited fund' embraced within the authorization of subsection (b)(1)(B) of Rule 23"); cough. In re Granada, supra, 803 F. Supp. at 1244 (assigning zero value to "claims of additional insurance" in

determining whether insurance fund was a limited fund because "the prospects for success [on those claims] are uncertain").

39. Alternatively, the "limited fund" may be viewed as the sum of the value of Fibreboard plus the value of its insurance coverage. See In re "Agent Orange" Product Liability Litigation, 100 F.R.D. 718, 724 (E.D. N.Y. 1983) (noting that in mass tort litigation, the "limited fund" is generally construed to be the assets of the defendants as extended by insurance coverage and the insurer's assets). Where insurance coverage is disputed, it is appropriate to value the insurance asset at a settlement value. See In re A.H. Robins, supra, 880 F.2d 709. The sale value of Fibreboard is at most $235 million. Findings of Fact at ¶ 265. The funds available to resolve Global Health Claimant Class claims under the Trilateral Settlement, after allowance is made for resolution of unsettled present claims and other items under the Trilateral Settlement, are approximately equal to the funds available under the Global Settlement, so the insurance asset may be valued at no more than $1.535 billion. Findings of Fact at ¶ 232. Under this scenario, the limited fund would equal at most approximately $1.77 billion.

40. As there is a significant risk that the "limited fund" would be insufficient in the tort system, Rule 23(b)(1)(B) certification is in order. See, e.g., In re A.H. Robins, supra, 880 F.2d at 741; In re Granada, supra, 803 F. Supp. at 1244; Bush, supra, [1986-87 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,999.

c. The Intervenors' objections

41. Mandatory class certification does not violate the Rules Enabling Act, 28 U.S.C. § 2072. Class members' substantive rights to full in personam judgments are not being "abridged" because an "arbitrary limit" is being set on the amount of damages that some class members might receive in the tort system. Mandatory class certification under Rule 23(b) (1)(B) of the Rules of Civil Procedure will not set any such limit on tort system rights: the settlement will. Every settlement involves such a compromise.

42. That Fibreboard retains most of its equity under the Global Settlement is irrelevant to the propriety of mandatory class certification. The Court need not ensure that a defendant designate a particular source of its assets to satisfy the class' claims; the Court need only determine whether the amount recovered by the class is fair. Drexel, supra, 960 F.2d at 293. There is no authority or reason why Class Counsel may settle a 23(b)(1)(B) class action only if all of the defendant's resources are included in the settlement. Such a rule would make no sense, would discourage settlements and has been rejected. See, e.g., In re Granada, supra, 803 F. Supp. at 1244; Bush, supra, [1986-87 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,999. In terms of the expected recovery for class members, the Global Settlement is far superior to either the Trilateral Settlement or to no settlement at all. Findings of Fact at ¶¶ 222 243. Moreover, the Class here has in substance been given value equal to all of Fibreboard's equity. Findings of Fact at ¶ 171.

43. Potential insolvency does not make Rule 23(b)(1)(B) inapplicable. See Manville, supra, 982 F.2d at 737-39; Drexel, supra, 960 F.2d at 292. The Rule was intended to operate in potential insolvency situations. See Advisory Committee Notes to Proposed 1966 Amendments to Federal Rules of Civil Procedure, reprinted in 39 F.R.D. 69, 101 (1966) (Rule 23(b)(1)(B) "applies to an action by a creditor to set aside a fraudulent conveyance by the debtor and to appropriate the property to his claim, when the debtor's assets are insufficient to pay all creditors' claims") (emphasis added). The Bankruptcy Code disclaims exclusivity and allows for nonbankruptcy alternatives. See 11 U.S.C. § 305(a)(1); see also, e.g., H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 325 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 35 (1978); In re Colonial Ford, Inc., 24 B.R. 1014 (Bank. D. Utah 1982); In re Michael S. Starbuck, Inc., 14 B.R. 134, 135 (Bankr. S.D.N.Y. 1981). The holding in In re Joint Eastern and Southern Dist. Asbestos Litigation (Keene), 14 F.3d 726 (2d Cir. 1993), is not to the contrary. Dictum in that case pertaining to the purported exclusivity of bankruptcy is (a) refuted by Second Circuit precedent (Manville, supra, 982 F.2d at 736-39; Drexel, supra, 960 F.2d at 292) and (b) irrelevant to this case, where bankruptcy was not a viable option for the Class. Findings of Fact at ¶¶ 35, 264.

44. The exercise of jurisdiction over people unknown or unborn is essential, not only, for example, to settle disputes, quiet title and effect equitable distributions, but also to protect and further the interests of the unknowns and unborns. Courts have properly invoked their equitable power in class actions or other cases involving multiple claimants where members of the class are unknown, unborn or incompetent, so

long as those members have been adequately represented. See, e.g., Klugh v. U.S., 818 F.2d 294, 301 (4th Cir. 1987); Hatch v. Riggs Nat. Bank, 361 F.2d 559, 565 (D.C. Cir. 1966); Meyer v. Citizens & Southern Nat. Bank, 677 F. Supp. 1196, 1200 (M.D. Ga. 1988); Mabry v. Scott, 124 P.2d 659, 664 (Cal. App.), cert. denied, 317 U.S. 670 (1942). This Court's judgment may bind people who may not yet know whether they have been injured by asbestos or unborn people, so long as appropriate procedures are used, such that those people are adequately represented. See, e.g., Hatch, supra, 361 F.2d at 565-66.

45. Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), does not require that the Class members be afforded an opportunity to opt-out. In traditional, unitary class actions (i.e., actions of the type within Rules 23(b)(1) and 23(b)(2)) absent class members' due process rights are satisfied so long as they receive adequate representation. See Hansberry, supra; Hartford Live Insurance Co. v. Ibs, supra; Smith v. Swormstedt, supra; Kincade v. General Tire & Rubber Co., 635 F.2d 501 (5th Cir. 981); see also Restatement (Second) of Judgments, § 41(1)(e) & (2); id., Comment f.

46. Shutts did not change this long-standing rule, rather it endorsed the Hansberry standard. See 472 U.S. at 808. Shutts held only that in connection with class actions seeking wholly or predominantly damages -- that is, class actions brought pursuant to the state-law analogues of Federal Rule of Civil Procedure 23(b)(3) -- plaintiffs beyond the jurisdictional reach of the court must be given a right to opt out of the class. See Phillips Petroleum v. Shutts, supra, 472 U.S. at 811. Shutts did not apply to class actions -- such as the one before the Court -- seeking equitable relief. See id. at 811 n.3

("Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief" (emphasis added)). See also In re Agent Orange, supra, 996 F.2d at 1435.

47. If the Supreme Court had intended its holding in Shutts to apply to cases arising under sections other than Rule 23(b)(3), thereby changing years of practice and effectively invalidating many of the types of cases customarily brought under Rules 23(b)(1) and 23(b)(2), it would have said so. See 1 Newberg on Class Actions, supra, § 1.21 at 1-49. Many other courts have concluded that Shutts does not have this effect. See, e.g., Crawford v. Honig, 37 F.3d 485, 487 n.2 (9th Cir. 1994); Grimes v. Vitalink Communications Corp, 17 F.3d 1553, 1560 (3d Cir. 1994); Arnold v. United Artists Theater Circuit, 1994 U.S. Dist. LEXIS 15345 (N.D. Cal. September 15, 1994); White v. National Football League, 822 F. Supp. 1389, 1410-12 (D. Minn. 1993), aff'd on other grds., 41 F.2d 402 (8th Cir. 1994); Nottingham Partners v. Dana, 564 A.2d 1089, 1101 (Del. Super. Ct. 1989); Manville, supra, 129 B.R. at 832; In re Jackson Lockdown/MCO Cases, supra, 107 F.R.D. at 713-14 (E.D. Mich. 1985); County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1302-05 (2d Cir. 1990). But see Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992), cert. dismissed as improvidently granted, 114 S. Ct. 1359 (1994); Waldron v. Raymark Indus., inc., 124 F.R.D. 235 (N.D. Ga. 1989).

48. Shutts is inapplicable for yet another reason. Shutts involved a 23(b)(3)-analogue class action brought

in Kansas state court, and resolved the question of the due process rights of class members who did not have minimum contacts with Kansas. This, however, is a federal court, and therefore the appropriate focus is on the question of minimum contacts with the nation. Federal courts can exercise adjudicatory power at least with respect to all persons and property located in the United States. United States v. Union Pac. R. Co., 98 U.S. 569, 604 (1878). See also Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 442 (1946); Robertson v. Railroad Labor Bd., 268 U.S. 619, 622 (1925); Toland v. Sprague, 37 U.S. (12 Pet.) 300, 328 (1838).

49. Rule 23 authorizes the federal courts to certify nationwide class actions. See Califano v. Yamasaki, 442 U.S. 682, 702 (1979). This is a class action in a federal court, Rule 23 is fully applicable, and therefore the Court has jurisdictional power over the nationwide class, regardless of whether the individual class members have minimum contacts with Texas.

d. Conclusion

50. The Health-Claimant Class should be certified for settlement purposes under Rule 23(b)(1)(B) with respect to its affirmative claims.

D. Rule 23(c)(4): No Need for Subclasses

51. Rule 23(c)(4)(B) of the Federal Rules of Civil Procedure provides that "a class may be divided into subclasses" "where appropriate." The decision whether to subclass rests within the discretion of the district court. See,

e.g., Clark Equip. Co. v. International Union, Allied Indus. Wkrs. of America, 803 F.2d 878, 880 (6th Cir. 1986), cert. denied, 480 U.S. 934 (1987); Mendoza v. Tucson School Dist. No. 1, 623 F.2d 1338, 1349-50 (9th Cir. 1980), cert. denied, 450 U.S. 912 (1981). "Subclassing," however, "is not encouraged," (Long Island Lighting Co., supra, 710 F. Supp. at 1447; Georgine, supra, 157 F.R.D. at 318), because it "often leads to more complex and protracted litigation" (Clark, supra, 803 F.2d at 880) and "compound[s] confusion and cost," County of Suffolk, supra, 710 F. Supp. at 1447; see, e.g., In re Agent Orange Product Liability Litigation, supra, 996 F.2d 1425, 1436 (2d Cir. 1993); Manual for Complex Litigation, § 30.16, at 206. There is a presumption against subclassing: "a certified class is assumed to be sufficiently harmonious and unified in interest that one set of attorneys can and should represent it adequately." Fisher v. Procter & Gamble Mfg. Co., 613 F.2d 527, 547 (5th Cir. 1980), cert. denied, 449 U.S. 1115 (1981). This presumption is overcome only when the proponent of subclassing successfully bears the burden of demonstrating that class members have potentially antagonistic interests and that subclasses "will materially improve the litigation." Clark, supra, 803 F.2d at 880; see United States Parole Commission v. Geraghty, 445 U.S. 388, 408 (1980) (proponent of subclassing bears burden on issue); Manual for Complex Litigation, § 30.16, at 206 ("The court should authorize . . . subclasses only to the extent that the need is clearly demonstrated."). The intervenors have not borne this burden. Findings of Fact at ¶¶ 344-69. See In re Corrugated Containers Antitrust Litigation, supra, 643 F.2d at 208; Manville, supra, 993 F.2d at 9-11; Georgine, supra,

157 F.R.D. at 318. Neither the Ortiz Intervenors nor the Maritime Intervenors have met this burden.[3]

E. Conclusion

52. It is proper to grant final certification to the mandatory settlement class defined in the Global Settlement Agreement.

III. FAIRNESS OF THE SETTLEMENT

A. Factors for assessing fairness

53. Federal Rule of Civil Procedure 23(e) requires the Court to determine whether a class action settlement is "fair, adequate and reasonable." Parker v. Anderson, 667 F.2d 1204, 1209 (5th Cir.), cert. denied, 459 U.S. 828 (1982); In re Corrugated Container Antitrust Litigation, supra, 643 F.2d at 207. The Court cannot modify the terms of the proposed settlement; rather, the Court must approve or disapprove of the proposed settlement "as a whole." See, e.g., Evans v. Jeff D., 475 U.S. 717, 727 (1986); Holmes v. Continental Can, 706 F.2d 1144, 1160 (11th Cir. 1983); Cotton v. Hinton, 559 F.2d 1326, 1331-32 (5th Cir. 1977).

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[3]The Maritime Intervenors have provided no reason why a maritime subclass is necessary, and the Court rejects their request for one. The Maritime Intervenors' position appears to be based upon McDermott, Inc. v. AmClyde, Inc., 114 S. Ct. 1461 (1994), which, they contend, established a unique judgment reduction rule for maritime law. McDermott, however, established no such rule. Even if it had, the Maritime Intervenors' demand for a subclass would still fail because the Global Settlement preserves all applicable judgment reduction rules; so, if there were a special maritime rule, it would not be affected by the Global Settlement.

54. There is a strong presumption in favor of the settlement's fairness. Parker, supra, 667 F.2d at 1209; Cotton v. Hinton, supra, 559 F.2d at 1331; Mashburn v. National Healthcare, Inc., 684 F. Supp. 660, 667 (M.D. Ala. 1988); Manual for Complex Litigation, § 30.41 (2nd ed. 1985).

55. The proposed settlement is not required to "achieve some hypothetical standard constructed by imagining every benefit that might someday be obtained in contested litigation." United States, supra, 517 F.2d at 850. Rather, "compromise is the essence of settlement," and the Court may "rely upon the judgment of experienced counsel for the parties." Cotton, supra, 559 F.2d at 1130 (some citations omitted).

56. The Fifth Circuit has set forth six factors to guide the Court's assessment of the fairness, reasonableness and adequacy of a proposed class-action settlement:

> (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of class counsel, class representative and absent class members.

Reed v. General Motors Corp., 703 F.2d 170, 172 (5th Cir. 1983). All factors support approval of the Global Settlement

here. Findings of Fact at ¶¶ 89-181, 203 (no fraud or collusion); ¶¶ 11-21 (complexity); ¶¶ 23-26, 33 (discovery); ¶¶ 36-57, 222-43, 255-59 (recovery); ¶ 203 (knowledgeable opinion).

B. The objections to the settlement's fairness

57. The Ortiz Intervenors contend that the settlement is unfair because Class members are giving up rights they would otherwise have: to obtain punitive damages and preand post-judgment interest against Fibreboard; to hold Fibreboard liable for other manufacturers' liability share; to obtain more than $500,000 in compensatory damages from Fibreboard; to file suit in the tort system immediately; and to pursue Fibreboard itself. The settlement is not unfair simply because the Class gave something up; the question is whether the Class received enough in return. As a practical matter, none of the surrendered rights was of great consequence to the Class. See Findings of Fact at ¶¶ 255-59. The benefits of the settlement to the Class, described above and in the Findings of Fact, greatly outweigh the concessions made by the Class.

58. The Ortiz Intervenors also argue that the existence of the Trilateral Agreement obviates any need or justification for these concessions. The Trilateral was entered into as a back-up to the Global Settlement, not an alternative, and the Court takes the settlement as the parties negotiated it. See Evans v. Jeff D., supra; Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1172 (5th Cir. 1978). In addition, the Court has found that the Trilateral Agreement would provide hundreds of millions of dollars less to the Class as a whole, presents a significant risk of leaving many Class members with no recovery at all, and subjects Class members to the

inefficiencies, burdens and delays of the tort system. Findings of Fact at ¶¶ 231-39.

C. Conclusion

59. The proposed settlement is fair, adequate, and reasonable to the class within the meaning of Rule 23(e).

IV. ADEQUACY OF COUNSEL

60. In order to approve the Global Settlement, the Court must be satisfied that Class Counsel adequately represented the Class. Conclusions of Law at ¶¶ 14, 19, 20. Under the applicable test, the fairness of the Global Settlement establishes a rebuttable presumption that Class Counsel adequately represented the Class. "It is, ultimately, in the settlement terms that . . . adequacy of [] representation is either vindicated or found wanting. If the terms themselves are fair, reasonable and adequate, the district court may fairly assume that they were negotiated by competent and adequate counsel." In re Corrugated Container, supra, 643 F.2d at 212; accord Parker, supra, 667 F.2d at 1211; Mars Steel Corp. v. Continental Ill. Nat. Bank & Trust Co., 834 F.2d 677, 684 (7th Cir. 1987).

61. There is no evidence here that Class Counsel's clients other than the Class lacked the same "general interests" as the Class, or that "specific features of the settlement sacrificed" the Class's interests to the interests of Class Counsel's other clients. In re Corrugated Container, supra, 643 F.2d at 208; see Findings of Fact at ¶¶ 315-317, 327-31. Accordingly, the Ortiz and Maritime Intervenors have not

"point[ed] to a trade-off of their rights and actual prejudice," and have therefore failed to rebut the presumption that counsel who negotiated a fair settlement represented the class adequately. In re Chicken Antitrust, supra, 669 F.2d at 237; see In re Corrugated Container, supra, 669 F.2d at 212; In re Agent Orange, supra, 800 F.2d at 19-20.

62. Moreover, as a result of the Court's appointment of a guardian ad litem and the extensive review the guardian conducted, the fairness determination is all the more dispositive of the adequacy-of-counsel issue.

63. The court hereby concludes that counsel adequately represented the class.

64. The Ortiz Intervenors' contend that Class Counsel was under a conflict of interest during the negotiations, and that, therefore, the Global Settlement should not be approved.[4]

65. Conflicts and other ethical issues before this Court are governed by "the ethical rules announced by the national profession in light of the public interest and the litigants' rights." In re American Airlines, Inc., 972 F.2d 605, 610 (5th Cir. 1992). The ethical rules have been developed and intended for use in the "traditional" lawyer-client context and

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[4]Two expert witnesses have testified in this proceeding as to whether Class Counsel were under a conflict. Professor Hazard testified that they were not. Professor Leubsdorf testified to the contrary. Because the issue is a mixed question of fact and law for the Court to decide, this Court may be guided by the expert testimony, but is not bound by it. See, e.g., In re Solerwitz, 848 F.2d 1573, 1578 (Fed. Cir. 1988); Georgine, supra, 157 F.R.D. at 327.

"should not be mechanically applied to the problems that arise in the settlement of class action litigation," lest their categorical application "have a serious adverse effect on class actions." In re Agent Orange Product Liability Litigation, 800 F.2d 14, 19 (2d Cir. 1986); see In re Corn Derivatives Antitrust Litigation, 748 F.2d 157, 163 (3d Cir. 1984) (Adams, J., concurring), cert. denied, 472 U.S. 1008 (1985); Georgine, supra, 157 F.R.D. at 326; 3 Newberg on Class Actions, § 15.01 at 15-3.

66. Rule 1.7(b) of the ABA Model Rules of Professional Conduct, governing conflicts of interest, provides, in pertinent part, that:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another clientor to a third person, or by the lawyer's own interests, unless:
>
> (1) The lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) The client consents after consultation . . . .

67. Under these authorities and for the reasons set forth in Findings of Fact at ¶¶ 300-76, the court concludes that class counsel acted ethically at all times during the negotiations. See Holden v. Burlington Northern, Inc., 665 F. Supp. 1398, 1426-27 (D. Minn. 1987).

68. The Court therefore concludes that Class Counsel professionally, adequately and ethically represented the Class.

V. ADEQUACY OF NOTICE

69. Rule 23(e) requires that the Class be given notice of the proposed settlement. That notice is required to be given "in such manner as the Court directs," and the Court has considerable discretion in determining what notice is appropriate. See, e.g., Fowler v. Birmingham News Co., 608 F.2d 1055, 1059 (5th Cir. 1979); Battle v. Liberty Nat. Life Ins. Co., 770 F. Supp. 1499, 1521 (N.D. Ala. 1991), aff'd, 974 F.2d 1279 (1992), cert. denied, 113 S. Ct. 2999 (1993).

70. The largest notice campaign in history was conducted, likely notifying over a hundred million persons. Findings of Fact at ¶¶ 418-36, 441-42. The requirements of Rule 23(e) and the Due Process Clause have been wholly satisfied.

71. The Court rejects the Ortiz Intervenors' contention that presently uninjured future claimants can never be adequately notified under any circumstances. Every court to have considered this argument has rejected it, as does this Court for the reasons set forth by those authorities. See, e.g., Carlough v. Amchem, supra, Civ. No. 93-0215, at 39-42 (Oct. 27, 1993); In re "Agent Orange" Product Liability Litigation, supra, 100 F.R.D. at 728-29; In re Johns-Manville Corp., 78 B.R. 407, 408-09 (S.D.N.Y. 1987), aff'd, 843 F.2d 636 (2d Cir. 1988); In re A.H. Robins, supra, 880 F.2d at 717, 752; see also In re Silicone Gel Breast Implant Products Liability Litigation

(MDL 926), Master File CV 92-P-1000-8 (N.D. Ala. Sept. 10, 1993).

VI. THE LHWCA SETTLEMENT

72. The Court concludes that the LHWCA class satisfies the requirements of Rule 23(a), and the action itself, which seeks declaratory and injunctive relief, satisfies Rule 23(b)(2). Conclusions of Law at ¶ 12; Findings of Fact at ¶¶ 275, 278, 292, 299. In assessing the fairness, adequacy and reasonableness of the LHWCA settlement, the Court applies the six-factor test described above. Conclusions of Law at ¶ 56. Upon reviewing the record, the Court concludes that (a) the LHWCA settlement is not the product of fraud or collusion; (b) the legal issues in the LHWCA context are sufficiently complex, and would be expensive to brief and argue; (c) there was adequate discovery; (d) the LHWCA class had little likelihood of successfully opposing an application for declaratory and injunctive relief against them; and (e) knowledgeable opinion supports the settlement. Findings of Fact at ¶¶ 398-417.

73. Applying the same legal standards to the LHWCA notice as set forth above, the Court finds that the LHWCA notice and its dissemination (Findings of Fact at ¶¶ 441-46) were fully satisfactory.

VII. THE THIRD-PARTY SETTLEMENT

A. Class certification

74. For the reasons given in the succeeding paragraphs, the Third-Party Claimant Class meets the

prerequisites of Rule 23(a) and should be certified as a mandatory defendant class under Rules 23(b)(1)(A), 23(b)(1)(B) and 23(b)(2).

75. The numerosity requirement is satisfied; Findings of Fact at ¶ 278; conclusions of Law at ¶ 14.

76. As to commonality, all third-party class members have a common interest in (1) eliminating the risk posed by the coverage litigation and facilitating a resolution that provides substantial funds to pay Fibreboard's liability share and (2) avoiding joint-and-several liability for Fibreboard's share by securing a fair process for obtaining set-offs, credits and/or subrogation rights. Major issues presented against the class are therefore common to all of its members, including: (1) whether substantial insurance proceeds will be available to provide compensation to plaintiffs reflecting Fibreboard's liability share; (2) whether a bar order against third-party claims would be appropriate in order to implement a settlement among plaintiffs, Fibreboard and the Insurers; and (3) whether it is appropriate to cut off class members' rights to litigate third-party claims against Fibreboard and/or the Insurers and to some degree curtail their contribution and indemnification rights in order to facilitate a resolution of the coverage dispute and establishment of a process for obtaining set-offs, credits and contribution rights.

77. Typicality is likewise established. The defenses of the third-party class representative, Owens Illinois, arise from the identical events, practices and course of conduct as those of the remainder of the class. Class members are all governed by the same settlement, and their defenses to the

Insurers' and Fibreboard's counterclaims seeking declarations regarding the fairness of that settlement and injunctions implementing it are thus of similar origin.

78. Finally, Owens-Illinois has adequately represented the third-party class. Owens-Illinois has been sued in thousands of asbestos-related personal injury suits throughout the country. Its relevant interests in ensuring that the maximum amount of money is available from either Fibreboard or the insurers to pay Fibreboard's liability share, in the treatment of whatever rights it may have to contribution or indemnification, and in preserving its rights of set-off, credits or subrogation against the Trust, are the same as those of all other members of the class. The Court also concludes that Owens-Illinois' counsel were well-qualified to represent the Class. Findings of Fact at ¶¶ 289-91, 298.

79. Any variations in interest among third-party class members are minor, are dwarfed by the overarching common interests all class members share, and do not render OwensIllinois' interests "antagonistic" for representation purposes. See, e.g., In re Corrugated Container, supra, 643 F.2d at 208; Georgine, supra; Jenkins, supra, 109 F.R.D. at 274.

80. Objectors Celotex and Carey Canada have provided no support for their claim that Owens-Illinois does not adequately represent their interests because they are in bankruptcy reorganization, and there is no basis for their position. Their argument is rejected.

81. Certification of the third-party class under Rule 23(b)(1)(A) will avoid the risk that multiple courts would

render inconsistent or varying adjudications with respect to the Insurers' and Fibreboard's counterclaims seeking declarations as to the fairness of the third-party settlement and injunctions against all third-party class members. Differing adjudications as to those matters would subject the Insurers and Fibreboard to incompatible standards of conduct. See Fed. R. Civ. P. 23(b)(1)(A).

82. Certification under Rule 23(b)(1)(B) is likewise appropriate. If Fibreboard and the Insurers were required to prosecute their counterclaims separately as against individual third-party class members, there would be a risk that adjudications would result disapproving the settlement and permitting separate actions by third-party class members against Fibreboard and/or the Insurers. For the reasons given above, permitting any such separate actions by third-party class members would risk substantially impairing the interests of the remainder of the third-party class by depleting the limited assets available to pay Fibreboard's liability share and by destroying the Global Settlement fund. Conclusions of Law at ¶ 32.

83. Finally, Fibreboard and the insurers, in settling disputes with the plaintiff and third-party classes, have acted on grounds generally applicable to the third-party class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to that class as a whole. Certification under Rule 23(b)(2) is thus appropriate as well.

B. Fairness of the settlement

84. The Court recognizes that the interests of the third-party class is in large part aligned with those of the Health-Claimant class. Each desires that the maximum amount of money be paid to claimants by Fibreboard and the Insurers in satisfaction of Fibreboard's liability share, thus eliminating risk that third-party class members would have to absorb Fibreboard's share under joint-and-several liability.

85. In assessing the fairness, adequacy and reasonableness of the third-party settlement, the Court applies the six-factor test described above. Conclusions of Law at ¶ 56. Upon review of the record, the Court is satisfied (a) that the third-party settlement was not the product of fraud or collusion (Findings of Fact at ¶ 216); (b) that third-party asbestos litigation is extremely complex and expensive (Findings of Fact at ¶ 212); and (c) that sufficient discovery has been taken in the asbestos litigation to permit intelligent evaluation of the third-party settlement (Conclusions of Law at ¶ 56).

86. With respect to the fourth and fifth factors, all alternatives to the settlement are less favorable to the Class. The third-party settlement is greatly preferable from the class's standpoint to a continuation of the coverage litigation. Moreover, the possibility that the plaintiffs, the Insurers and Fibreboard would agree to a global settlement without also concluding a settlement of third-party claims is likewise a disadvantageous one. In the absence of the third-party settlement, Insurers and Fibreboard could well have been entitled to a bar order against third-party claims, leaving the third-party class without many of the benefits of the settlement.

E.g., In re Silicone Gel Breast Implant Products Liability Litigation, 1994 WL 578353, at *18; see also South Carolina National Bank v. Sonte, 139 F.R.D. 335, 344 (D.S.C. 1991) (citing cases). Finally, given that the Trilateral Agreement likely would afford less money to claimants as a whole and the significant risk that it would afford no money to many claimants, it is likewise less advantageous to the third-party class.

87. Knowledgeable opinion favors the third-party settlement. Only a handful of objections have been received; The Court has considered them, and finds them to be without merit.

88. The Court accordingly concludes that the third-party settlement is fair, adequate and reasonable.

C. Notice

89. The notice given the third-party class was adequate and complies with due process.

Signed this 27th day of July, 1995.

Circuit Judge Robert M. Parker
Circuit Court Judge
United States Court of Appeals
Fifth Circuit
Sitting by Designation

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

GERALD AHEARN, JAMES DENNIS, CHARLES W. JEEP, JAMES ELLISON and WILLIAM JAMES MITCHELL, on Behalf of Themselves and Others Similarly Situated,	:	Civil Action
Plaintiffs	: No.	
v.		: 6:93cv526
FIBREBOARD CORPORATION and BETHLEHEM STEEL CORPORATION	:	
Defendants,	:	
CONTINENTAL CASUALTY COMPANY, CNA CASUALTY COMPANY OF CALIFORNIA, COLUMBIA CASUALTY COMPANY and PACIFIC INDEMNITY COMPANY, Defendant-Intervenors.	:	
OWENS-ILLINOIS, INC., on Behalf of Itself and Others Similarly Situated, Additional Counterclaim Defendant.	:	

SUPPLEMENTAL CONCLUSIONS OF LAW

July 27, 1995

Based in part on the findings of fact entered in this case, the Court makes the following supplemental conclusions of law.[1]

I. CERTIFICATION OF THE GLOBAL HEALTH CLAIMANT CLASS AS A COUNTERCLAIM DEFENDANT CLASS

1. The requirements for certification of a defendant class are the same as the requirements for certification of a plaintiff class: Each of the requirements of Rule 23(a) and at least of the requirements of Rule 23(b) must be satisfied.

A. The requirements of Rule 23(a)

2. The Global Health Claimant Class (GHCC) is the same size whether it is a plaintiff or a defendant class. It satisfies the numerosity requirement as to the counterclaims for the same reasons that it satisfies the requirement as a plaintiff class. See Conclusions of Law at ¶ 15.

3. The GHCC members have an overriding common interest in eliminating the risk that they

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[1] To the extent the following supplemental conclusions of law include findings of fact or mixed findings of fact and conclusions of law, those findings are hereby adopted by this Court.

face posed by the insurance coverage litigation. Findings of Fact at ¶¶ 4, 34, 54, 57, 225, 278, 346. The commonality requirement is, accordingly, satisfied.

4. In a defendant class action, typicality is shown if "the same event, practice, or course of conduct has given rise to the defense of the class members and their named representatives." In re Rusty Jones, Inc., 128 B.R. 1001, 1013 (N.D. Ill. 1991). The GHCC's representatives' defenses to the Insurers' and Fibreboard's counterclaims arise from the "same event[s], practice[s] and course[s] of conduct" as do those of the remainder of the Class. Findings of Fact at ¶ 288. The typicality requirement is satisfied.

5. The same class representatives and class counsel who represent the GHCC in connection with their claims against Fibreboard represent the GHCC as a defendant class against the counterclaims of the Insurers and Fibreboard. The adequacy of representation requirement is satisfied for the reasons set forth in the Conclusions of Law at ¶ 19-24.

B. The requirements of Rule 23(b)

6. Rule 23(b)(1)(A) provides for mandatory class certification where the prerequisites of Rule 23(a) are met and:

> (1) the prosecution of separate actions by or against individual members of the Class would create a risk of

> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class . . . .

7. Prosecution of the counterclaims against individual members of the Class would create a "risk" of "inconsistent or varying adjudications" that would "establish incompatible standards of conduct" for the insurers and Fibreboard. Differing adjudications as to the validity and enforceability of the global settlement would impair the insurers' and Fibreboard's ability to pursue a uniform course of conduct with respect to Class members, and would subject them to conflicting instructions as to whether to order the escrow to turn over the settlement monies to the Trust and whether to consider and respond to future claims filed directly against them. See Robertson v. National Basketball Ass'n, 389 F. Supp. 867, 901 (S.D.N.Y. 1975), aff'd, 556 F.2d 682 (2d Cir. 1977). Accordingly, the requirements of Rule 23(b)(1)(A) are satisfied.

8. The requirements of certification pursuant to Rule 23(b)(1)(B) are set forth in the Conclusions of law at ¶¶ 21-40.

9. The Insurers' and Fibreboard's counterclaims seek declarations approving the Global Settlement and enjoining separate actions by Class members. If those counterclaims were prosecuted separately as against individual Class members, there would be a risk that one or more adjudications would result disapproving the settlement

and permitting separate actions by Class members against Fibreboard and/or the insurers. Permitting any such separate actions by Class members would create a risk of substantial impairment within the meaning of Rule 23(b)(1)(B) to the remainder of the Class. Conclusions of Law at ¶ 35. Certification of the Class as a defendant class under Rule 23(b)(1)(B) is thus appropriate.

10. Rule 23(b)(2) provides for mandatory class certification where the Rule 23(a) prerequisites are met and "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making ap-propriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . ." Many courts have certified defendant classes under Rule 23(b)(2). See, e.g., Marcera v. Chinlund, 595 F.2d 1231, 1238-39 (2d Cir.), judgment vacated on other grds, 442 U.S. 915 (1979), on remand, Marcera v. Chinlund, 91 F.R.D. 579 (W.D.N.Y. 1981) (certifying defendant class in 23(b)(2) action); Blake v. Arnett, 663 F.2d 906, 911-13 (9th Cir. 1981); Houston Chapter of the Int'l Ass'n of Black Professional Firefighters v. Houston, 1991 WL 340296, at *3, *28 (S.D. Tex. May 3, 1991); Thornton v. Butler, 728 F. Supp. 679, 681 & n.6 (M.D. Ala. 1990); United States v. Rainbow Family, 695 F. Supp. 314, 319-21 (E.D. Tex. 1988); Baker v. Wade, 553 F. Supp. 1121, 1125 n.1 (N.D. Tex. 1982), rev'd on other grounds, 769 F.2d 289 (5th Cir. 1984) (en banc), cert. denied, 478 U.S. 1022 (1986); Doss v. Long, 93 F.R.D. 112, 115, 119 (N.D. Ga. 1981).

11. The Insurers and Fibreboard have "acted . . . on grounds generally applicable to the class" by entering into proposed settlements that affect the rights of all members of the Class. "[F]inal injunctive relief [and] corresponding declaratory relief with respect to the class as a whole," in the form of a declaration that the settlement is fair, reasonable and adequate and injunctions regulating the resolution of future claims, is appropriate.

12. The Court therefore concludes that the GHCC should be certified for settlement purposes as a defendant class under Rules 23(b)(1)(A), 23(b)(1)(B) and 23(b)(2) with respect to Fibreboard's and the Insurers' counterclaims.

II. INTERPLEADER JURISDICTION

13. Title 28 U.S.C. § 1335, creates three requirements for certification of interpleader actions: (1) the action must be brought by a party with over $500 at stake; (2) there must be two or more adverse claimants to the money or property; and (3) the impleaded money or property, or a bond in the same amount, must be deposited with the Court. See 28 U.S.C. § 1335. The statute is "liberally construed" to effectuate its purpose, the protection of a stakeholder "from the possibility of multiple claims upon a single fund." In the Matter of Bohart, 743 F.2d 313, 324 (5th Cir. 1984); see also State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 533 (1967) (same); Maryland Casualty Co. v. Glassell-Taylor & Rob-inson, 156 F.2d 519 (5th Cir. 1946); Lummis v. White, 629 F.2d 397, 399-400 & n.6 (5th Cir. 1980), rev'd on other grounds sub nom. Cory v. White, 457 U.S. 85 (1982).

14. Each of section 1335's requirements is satisfied here. Findings of Fact at ¶¶ 204, 278.

15. The Court rejects the Ortiz Intervenors contention that there can be no interpleader jurisdiction because "there is no true limited fund which could support interpleader certification." The Global Settlement created the fund that must be equitably distributed among class members (Conclusions of Law ¶ 38), and the invocation of interpleader is therefore permissible. Interpleaders have been used to effectuate mandatory class-action settlements. See, e.g., Bush v. Rewald, (1986-87 Transfer Binder) Fed. Sec. L. Rep. (CCH) ¶ 92,999 (D. Haw. Sept. 4, 1986); Grantham v. J.L. Mason Group, 811 F. Supp. 1386 (E.D. Mo. 1993).

16. Statutory interpleader also establishes personal jurisdiction over class members' claims against Fibreboard even though those claims were, prior to the settlement, in personam in character. Through the agreement of representative plaintiffs on behalf of all class members, the claims of plaintiffs are limited to the fund that has been established. Findings of Fact at ¶¶ 191-94, 260. Thus, the circumstance presented is that of a classic interpleader. See State Farm Fire & Casualty v. Tashire, 386 U.S. 523, 534 (1967).

Signed this 27th day of July, 1995

Circuit Judge Robert M. Parker
Circuit Court Judge
United States Court of Appeals
Fifth Circuit
Sitting by Designation

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

GERALD AHEARN, JAMES DENNIS, CHARLES W. JEEP, JAMES ELLISON and WILLIAM JAMES MITCHELL, on Behalf of Themselves and Others Similarly Situated,		: Civil Action
Plaintiffs	: No.	
v.		: 6:93cv526
FIBREBOARD CORPORATION and BETHLEHEM STEEL CORPORATION Defendants,		:
CONTINENTAL CASUALTY COMPANY, CNA CASUALTY COMPANY OF CALIFORNIA, COLUMBIA CASUALTY COMPANY and PACIFIC INDEMNITY COMPANY, Defendant-Intervenors.		:
OWENS-ILLINOIS, INC., on Behalf of Itself and Others Similarly Situated, Additional Counterclaim Defendant.		:

July 27, 1995

JUDGMENT APPROVING GLOBAL SETTLEMENT

A Global Settlement Agreement was entered into as of December 23, 1993 by and among plaintiffs Gerald Ahearn, James Dennis and Charles W. Jeep (collectively "Representative Plaintiffs"), on behalf of themselves and the provisionally certified plaintiff class in the above-captioned action (the "Settlement Class"), defendant Fibreboard Corporation and defendant-intervenors Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company and Pacific Indemnity Company. The Global Settlement Agreement was amended by the parties on December 21, 1994, February 6, 1995 and May 15, 1995 (the Global Settlement Agreement, as amended, will henceforth be referred to as the "Global Settlement Agreement"). A Defendant Class Settlement Agreement was entered into as of December 22, 1993 by and among the Representative Plaintiffs, on behalf of themselves and the Settlement Class, Fibreboard Corporation, Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company, Pacific Indemnity Company, and counterclaim defendant Owens-Illinois, Inc., on behalf of itself and the counterclaim defendant class subsequently provisionally certified in the above-captioned action (the "Global Third Party Claimant Class").

Following notice to the two affected classes, the Court held a hearing commencing on December 12, 1994 to consider whether the Global Settlement Agreement should be approved as fair, reasonable and adequate pursuant to Rule 23(e), Fed. R. Civ. P. Based on the evidence presented at the hearings, together with the papers and statements of counsel submitted by the parties in connection therewith, and the findings of fact and conclusions of law heretofore entered by the Court, the Court

has determined that the Global Settlement Agreement is fair, reasonable and adequate and should be approved.

All capitalized terms not otherwise defined herein have the meanings set forth in the Glossary attached as Exhibit A hereto.

IT IS ORDERED, ADJUDGED AND DECREED, that:

I. The terms and provisions of the Global Settlement Agreement, including the releases and indemnities contained therein, are approved;

II. The Trust Agreement and the Trust Distribution Process incorporated in the Global Settlement Agreement are approved;

III. The parties shall implement the Global Settlement Agreement;

IV. The settlement reflected by the Global Settlement Agreement, with respect to both Class Member Claims and Third Party Claims, is fair, reasonable and adequate, and was entered into in good faith;

V. The Settlement Class Members and the Global Third Party Claimant Class Members have received adequate notice of the settlement contemplated by the Global Settlement Agreement, Rule 23 of the Federal Rules of Civil Procedure and the Constitution of the United States.

VI. The Settlement Class Members have been adequately, professionally and ethically represented by Class Counsel.

VII. All Class Member Claims, except for claims for punitive or exemplary damages, are directed to the

Trust for disposition pursuant to the Trust Agreement and Trust Distribution Process;

VIII. As provided with specificity in the separate Judgment Approving Longshore Settlement, any settlement approved by the Court in this action is not and shall not be deemed to be a "settlement" or a "compromise" within the meaning of either Section 933(g)(1) or 933(g)(2) of the Longshore and Harbor Workers' Compensation Act ("LHWCA") or Section 702.281 of Title 20 of the Code of Federal Regulations, nor is this Judgment Approving Global Settlement, the separate Judgment Approving Longshore Settlement and/or the separate Judgment Approving Agreement Regarding Plant Insulation Company a "judgment" under Section 933(g)(2) of the LHWCA with respect to any claim for which any member of the Settlement Class would otherwise be entitled to compensation under the LHWCA. Only individual settlements by, or awards on claims of, Settlement Class Members with or against the Trust shall trigger the notice, approval or forfeiture provisions of the LHWCA and other similar state and federal workers' compensation provisions.

IX. The Class Action, and all Class Member Claims (including all punitive and exemplary damage claims) against the Fibreboard, Continental and Pacific Releasees, are dismissed on the merits, without costs and with prejudice;

X. The provision contained in the Global Settlement Agreement whereby Fibreboard Corporation and the Insurers agree that the Insurers shall be discharged from any further obligation under or in connection with the Insurance Policies, except as an Insurer has specifically assumed under the Global Settlement Agreement or has preserved under the Settlement Agreement (and the related agreements referred to therein), is fair, reasonable and non-collusive;

XI. The Fibreboard, Continental and Pacific Releasees are discharged from any further liability with respect to any Class Member Claim or Third Party Claim;

XII. Fibreboard Corporation and its subsidiaries are permanently enjoined from asserting any and all claims of whatsoever description by Fibreboard Corporation and its subsidiaries, including bad faith claims, against (i) Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company, their parents, subsidiaries, affiliates, directors, employees, officers, agents and attorneys or (ii) Pacific Indemnity Company, its parents, subsidiaries, affiliates, directors, employees, officers, agents and attorneys; except that this injunction shall not extend to any claims arising out of the Global Settlement Agreement, the Settlement Agreement among Fibreboard Corporation, Continental Casualty Corporation, CNA Casualty Company of California, Columbia Casualty Company and Pacific Indemnity Company dated October 12, 1993 (or the related agreements referred to therein) or any obligation of the Settlement Class, Fibreboard Corporation, Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company, and Pacific Indemnity Company pursuant to an agreement or agreements entered into after December 23, 1993. Notwithstanding the foregoing exceptions, this injunction shall extend to any and all claims arising from paragraphs 1 and 2 of the April 9, 1993 agreement between Fibreboard Corporation and Continental Casualty Company, CNA Casualty Company of California and Columbia Casualty Company (the "April 9 Agreement").

XIII. All Settlement Class Members[1] are

[1] Settlement Class Members are:

(a) All persons (or their legal representatives) who prior to August 27, 1993 were exposed, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member or any other person), to asbestos or to asbestos-containing products for which Fibreboard may bear legal liability and who have not, before August 27, 1993, (i) filed a lawsuit for any asbestos related personal injury, or damage, or death arising from such exposure in any court against Fibreboard or persons or entities for whose actions or omissions Fibreboard bears legal liability; or (ii) settled a claim for any asbestos-related personal injury, or damage, or death arising from such exposure with Fibreboard or with persons or entities for whose actions or omissions Fibreboard bears legal liability;

(b) All persons (or their legal representatives) exposed to asbestos or to asbestos-containing products, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member or any other person), who dismissed an action prior to August 27, 1993 without prejudice against Fibreboard, and who retain the right to sue Fibreboard upon development of a nonmalignant disease process or a malignancy; provided, however, that the Settlement Class does not include persons who filed and, for cash payment or some other negotiated value, dismissed claims against Fibreboard, and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy; and

(c) All past, present and future spouses, parents, children and other relatives (or their legal representatives) of the class members described in paragraphs (a) and (b) above, except for any such person who has, before August 27, 1993, (i) filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) or (b) above in any court against Fibreboard (or against entities for whose actions or omissions Fibreboard bears legal liability), or (ii) settled a claim for the asbestos-related personal injury, or damage, or death of a class member described in (a) or (b) above with Fibreboard (or with entities for whose actions or omissions Fibreboard bears legal liability).

For purposes of this definition, a claim included within the terms of a settlement agreement (whether written, oral, or placed on a court record) prior to August 27, 1993 shall be deemed to have been settled before August 27, 1993 even if (i) an opt-out with respect to that claim has been or is exercised, or (ii)

(continued...)

permanently enjoined from asserting against (i) any Fibreboard Releasee,[2] (ii) Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company, their parents, subsidiaries, affiliates, directors, employees, officers, agents and attorneys or (iii) Pacific Indemnity Company, its parents, subsidiaries, affiliates, directors, employees, officers, agents and attorneys any Personal Injury Asbestos Claim of such Settlement Class Member, which is defined as:

(a) each and every claim, demand, action or suit of any kind for personal injury arising, directly or indirectly, from exposure to asbestos-containing products (including, without limitation, any direct action claim, wrongful death claim, punitive or exemplary damages claim, loss of consortium claim,

[1](...continued)

the settlement is subsequently repudiated by the Plaintiff; provided, however, that no claim which was included within the terms of a settlement agreement and which claim was not filed prior to August 27, 1993 shall be deemed settled unless it was eligible to be processed and liquidated prior to August 27, 1993.

[2] The "Fibreboard Releasees" mean the following entities, each of their respective predecessors, Subsidiaries, divisions, current and former attorneys, officers, directors and employees, and, with regard to Fibreboard Corporation's liability only, each of their respective successors in interest;

(a) Fibreboard Corporation; Fibreboard Paper Products Corporation; Fibreboard Products, Incorporated; Paraffine Companies, Incorporated; Plant Rubber & Asbestos Works; Pabco Products, Incorporated; and Pabco Insulation Corporation; and

(b) Louisiana Pacific Corporation (other than for asbestos-related claims against Louisiana-pacific which (a) state a basis for liability by Louisiana-Pacific wholly independent of any relationship between Louisiana-Pacific and Fibreboard Corporation or any act or omission in connection with such a relationship, and (b) as to which there is no basis for any claim against Fibreboard Corporation by the claimant or by Louisiana-Pacific.

fear of disease claim, bad faith claim, or surviving personal injury claim), and whether such injury manifested itself heretofore or here after, or (b) any claim, demand, action or suit of any kind arising, directly or indirectly, from any such claim, demand, action or suit referred to in (a) above (including without limitation any bad faith claim, contribution claim, indemnity claim, warranty claim, direct action claim or Additional Policy Claim[3]) against Fibreboard, against the

[3] "Additional Policy Claim" means each and every claim, de-mand, action or suit of any kind (i) which arises under, pursuant to or related to the Insurance Policies by any person or entity, whether directly or indirectly asserted against the Insurers or any third party, or arising under any term or terms or alleged coverage provided by the Insurance Policies and (ii) which arises directly or indirectly from personal injury resulting from exposure to asbestos or asbestos-containing materials for which Fibreboard may bear legal liability. For purposes of this definition: (a) "Insurance Policies" means policy number CLP 3197650 issued by Continental Casualty Company effective May 4, 1957, in favor of Fibreboard Corporation under its former name (Fibreboard Paper Products Corporation), policy number RD 951 90 81 issued by Continental Casualty Company, policy number RDU 975 65 87 issued by CNA Casualty Company of California and an endorsement thereto issued by Continental Casualty Company, policy number RDU 186 27 82 issued by Columbia Casualty Company, policy number RDU 186 30 62 issued by Columbia Casualty Company, policy number RDU 365 32 19 issued by Columbia Casualty Company, the policy that was alleged by Fibreboard Corporation to have been issued by Continental Casualty Company in the period 1954-56, and policy number LAC 88700 found to have been issued by Pacific Indemnity Company to Fibreboard Corporation effective May 4, 1956, and any other policies that were, or may be alleged to have been, issued to Fibreboard Corporation by any of the Insurers, including those set forth in the Pacific Indemnity Agreement; and (b) "Insurers" means (i) Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company and all insurance or indemnity companies controlling, controlled by or under common control with any of them or (ii) Pacific Indemnity Company and all insurance or indemnity companies controlling, controlled by or under common control with it.

Insurance Policies or against the Insurers (as those terms are defined in the preceding footnote) in any way predicated on obligations created by the Insurance Policies; provided, however, that a Personal Injury Asbestos claim shall not include any claim for benefits brought by an employee or his or her personal representative under any federal or state workers compensation statute (including, but not limited to, the United States Longshore and Harbor Workers Compensation Act and the Federal Employees Compensation Act), but shall include any subrogation, contribution or indemnity claim arising from such claim for benefits.

XIV. All Global Third Party Claimant Class Members[4] are permanently enjoined from asserting any Third Party Claim[5] against (i) any Fibreboard Releasee (as defined

[4] Global Third Party Claimant Class Members are:

All individuals, corporations, partnerships or associations, whether or not incorporated, and any federal or local government or agency thereof, or any other entity and his, her or its legal representative, that have a Third Party Claim (as defined below). The fifty states of the United States (and their governmental units and divisions entitled to immunity under the Eleventh Amendment to the United States Constitution), and governments of foreign nations (and units and divisions thereof) entitled to sovereign immunity are not Global Third Party Claimant Class Members.

[5] Third Party Claims are any and all Personal Injury Asbestos Claims not held by Settlement Class Members (as those terms are defined above), except for the following:

(a) Settled Claims, which are defined as claims of indi viduals for asbestos-related personal injuries (i) that are not Personal Injury Asbestos Claims of Settlement Class Members and (ii) that as of August 27, 1993 had been settled (by Fibreboard Corporation or by Fibreboard Corporation and Continental) or were the subject of a verdict or judgment. For purposes of the

(continued...)

above), (ii) Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company, their parents, subsidiaries, affiliates, directors, employees, officers, agents and attorneys or (iii) Pacific Indemnity Company, its parents, subsidiaries, affiliates, directors, employees, officers, agents and attorneys.

XV. The provisions set forth in the Global Settlement Agreement and the Trust Distribution Process for the resolution of Third Party Claims are approved and the terms and conditions of the Defendant Class Settlement Agreement are approved;

XVI. As provided with specificity in the separate Judgment Approving Agreement Regarding Plant

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[5](...continued)
definition of Settled Claims, a claim included within the terms of a settlement agreement (whether written, oral or placed on a court record) prior to August 27, 1993 shall be deemed to have been settled before August 27, 1993 even if (A) an opt-out right with respect to that claim has been or is exercised, or (B) the settlement is subsequently repudiated by the Plaintiff; provided, however, that no claim which was included within the terms of a settlement agreement and which was not filed prior to August 27, 1993 shall be deemed settled unless it was eligible to be processed and liquidated prior to August 27, 1993;

(b) Unsettled Claims, which are defined as claims of individuals for asbestos-related personal injuries brought against Fibreboard in lawsuits filed prior to August 27, 1993 and that are not Settled Claims. For purposes of this definition, "Unsettled Claims" shall include claims of persons who filed and for cash payment or some other negotiated value dismissed claims against Fibreboard and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy; or

(c) any claims arising directly or indirectly from any Settled Claims or Unsettled Claims.

Insulation Company, the agreement by and among the parties regarding Plant Insulation Company is approved.

XVII. The Court retains exclusive jurisdiction (a) to enforce the provisions of this judgment; (b) to resolve any disputes as to the performance or interpretation of the Global Settlement Agreement or this judgment; (c) to adjudicate any attempt by any person to challenge this judgment in any respect; and (d) over the maintenance, administration and distribution of the Trust and the funds contained therein, subject to and in accordance with the provisions of the Trust Agreement and Trust Distribution Process incorporated therein.

Dated: July 27, 1995

ROBERT M. PARKER
CIRCUIT COURT JUDGE
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
SITTING BY DESIGNATION

GLOSSARY

1. "Affiliate" of a Person means (i) a Subsidiary of such Person, (ii) a Person which owns, either alone or with or through one or more Affiliates, directly or indirectly, securities or other ownership interests having ordinary voting power to elect a majority of the board of directors or other persons performing similar functions of such Person, and (iii) a Subsidiary of any Affiliate of such Person.

2. "Class Action" means Ahearn, et al. v. Fibreboard Corp., et al., 6:93 cv 526 (E.D. Tex), filed by the Representative Plaintiffs in the Global Court on behalf of themselves and the Settlement Class against Fibreboard Corporation on September 9, 1993.

3. "Class Counsel" means Joseph F. Rice and Joseph B. Cox, Jr., of the firm of Ness, Motley, Loadholt, Richardson & Poole, P.C.; Harry F. Wartnick, of the firm of Wartnick, Chaber, Harowitz, Smith & Tigerman; and Steven Kazan, of the firm of Kazan, McClain, Edises & Simon; or successors of the foregoing individuals.

4. "Class Member Claim" means any Personal Injury Asbestos Claim of a Settlement Class Member.

5. "Continental Releasees" means Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company, their parents, Subsidiaries, Affiliates, directors, employees, officers, agents and attorneys.

6. "Fibreboard" means Fibreboard Corporation; Fibreboard Paper Products Corporation;

Fibreboard Products, Incorporated; Paraffine Companies, Incorporated; Plant Rubber & Asbestos Works; Pabco Products, Incorporated; and Pabco Insulation Corporation; and each of their respective predecessors, Subsidiaries and divisions, and with regard to Fibreboard Corporation's liability only, each of their respective successors in interest.

7. "Pacific Indemnity Agreement" collectively means the Agreement and a Rescission of Insurance Policies, both dated March 27, 1992, between Fibreboard Corporation and Pacific Indemnity Company, pursuant to which Pacific and Fibreboard agreed to settle their insurance coverage dispute.

8. "Pacific Releasees" means Pacific Indemnity Company, its parents, Subsidiaries, Affiliates, directors, employees, officers, agents and attorneys.

9. "Person" means any individual, corporation, partnership or association, whether or not incorporated, and any federal, state or local government or agency thereof, or any other entity and his, her or its legal representative.

10. "Settlement Agreement" means the agreement among Fibreboard Corporation, Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company and Pacific Indemnity Company dated as of October 12, 1993 pursuant to which they agreed, among other things, to settle and compromise all claims and potential claims against the Insurers under the Insurance Policies.

11. "Subsidiary" means, with respect to any Person, any corporation or other entity in which that Person

owns, directly or indirectly, securities or other ownership interest having ordinary voting power to elect a majority of the board of directors or other Persons performing similar functions.

12. "Trust" means the trust referred to in Article V of the Global Settlement Agreement.

13. "Trust Agreement" means the Fibreboard Asbestos Compensation Trust Agreement among Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company, Pacific Indemnity Company, Fibreboard Corporation and the Trustees attached as Exhibit B to the Global Settlement Agreement, as amended.

14. "Trust Distribution Process" means Annex A to the Trust Agreement, as amended.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

GERALD AHEARN, JAMES DENNIS, CHARLES W. JEEP, JAMES ELLISON and WILLIAM JAMES MITCHELL, on Behalf of Themselves and Others Similarly Situated, Plaintiffs	: Civil Action
v.	: No. 6:93cv526
FIBREBOARD CORPORATION and BETHLEHEM STEEL CORPORATION Defendants,	:
CONTINENTAL CASUALTY COMPANY, CNA CASUALTY COMPANY OF CALIFORNIA, COLUMBIA CASUALTY COMPANY and PACIFIC INDEMNITY COMPANY, Defendant-Intervenors.	:
OWENS-ILLINOIS, INC., on Behalf of Itself and Others Similarly Situated, Additional Counterclaim Defendant.	:

July 27, 1995

JUDGMENT REGARDING CLASS CERTIFICATION

All capitalized terms not otherwise defined herein have the meanings set forth in the Glossary attached as Exhibit A hereto.

IT IS ORDERED, ADJUDGED AND DECREED, that:

I. The following Settlement Class be certified, for settlement purposes only, as a mandatory, non-opt-out class under Rules 23(a) and 23(b)(1)(B) of the Federal Rules of Civil Procedure:

(a) All persons (or their legal representatives) who prior to August 27, 1993 were exposed, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member or any other person), to asbestos or to asbestos-containing products for which Fibreboard may bear legal liability and who have not, before August 27, 1993, (i) filed a lawsuit for any asbestos related personal injury, or damage, or death arising from such exposure in any court against Fibreboard or persons or entities for whose actions or omissions Fibreboard bears legal liability; or (ii) settled a claim for any asbestos-related personal injury, or damage, or death arising from such exposure with Fibreboard or with persons or entities for whose actions or omissions Fibreboard bears legal liability;

(b) All persons (or their legal representatives) exposed to asbestos or to asbestos-containing products, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member or any other person), who dismissed an action prior to August 27, 1993 without prejudice against Fibreboard, and who retain the right to sue Fibreboard upon development of a nonmalignant disease process or a malignancy; provided, however, that the Settlement Class does not include persons who filed and, for cash payment or some other negotiated value, dismissed claims against

Fibreboard, and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy; and

(c) All past, present and future spouses, parents, children and other relatives (or their legal representatives) of the class members described in paragraphs (a) and (b) above, except for any such person who has, before August 27, 1993, (i) filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) or (b) above in any court against Fibreboard (or against entities for whose actions or omissions Fibreboard bears legal liability), or (ii) settled a claim for the asbestos-related personal injury, or damage, or death of a class member described in (a) or (b) above with Fibreboard (or with entities for whose actions or omissions Fibreboard bears legal liability).

For purposes of this class definition, a claim included within the terms of a settlement agreement (whether written, oral, or placed on a court record) prior to August 27, 1993 shall be deemed to have been settled before August 27, 1993 even if (i) an opt-out with respect to that claim has been or is exercised, or (ii) the settlement is subsequently repudiated by the Plaintiff; provided, however, that no claim which was included within the terms of a settlement agreement and which claim was not filed prior to August 27, 1993 shall be deemed settled unless it was eligible to be processed and liquidated prior to August 27, 1993.

II. The following Global Third Party Claimant Class is certified, for settlement purposes only, as a mandatory, non-opt-out defendant class under Rules 23(a), 23(b)(1)(A), 23(b)(1)(B) and 23(b)(2) under the Federal Rules of Civil Procedure:

All individuals, corporations, partnerships or associations, whether or not incorporated, and any federal or local government or agency thereof, or any other entity and his, her or its legal representative ("Persons"), that have a Third Party Claim, which is defined as any Personal Injury Asbestos Claim that is not a Class Member Claim, except for Settled Claims, Unsettled Claims or any claims arising directly or indirectly from any such Settled Claims or Unsettled Claims; provided, however, that the fifty states of the United States (and their governmental units and divisions entitled to immunity under the Eleventh Amendment to the United States Constitution), and governments of foreign nations (and units and divisions thereof) entitled to sovereign immunity are not members of the Global Third Party Claimant Class.

Dated: July 27, 1995

ROBERT M. PARKER
CIRCUIT COURT JUDGE
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
SITTING BY DESIGNATION

GLOSSARY

1. "Additional Policy Claim" means each and every claim, demand, action or suit of any kind (i) which arises under, pursuant to or related to the Insurance Policies by any person or entity, whether directly or indirectly asserted against the Insurers or any third party, or arising under any term or terms or alleged coverage provided by the Insurance Policies and (ii) which arises directly or indirectly from personal injury resulting from exposure to asbestos or asbestos-containing materials for which Fibreboard may bear legal liability.

2. "Class Member Claim" means any Personal Injury Asbestos Claim of a Settlement Class Member.

3. "Fibreboard" means Fibreboard Corporation; Fibreboard Paper Products Corporation; Fibreboard Products, Incorporated; Paraffine Companies, Incorporated; Plant Rubber & Asbestos Works; Pabco Products, Incorporated; and Pabco Insulation Corporation; and each of their respective predecessors, Subsidiaries and divisions, and with regard to Fibreboard Corporation's liability only, each of their respective successors in interest.

4. "Insurance Policies" means policy number CLP 3197650 issued by Continental Casualty Company effective May 4, 1957, in favor of Fibreboard Corporation under its former name, Fibreboard Paper Products Corporation, policy number RD 951 90 81 issued by Continental Casualty Company, policy number RDU 975 65 87 issued by CNA Casualty Company of California and an endorsement thereto issued by Continental Casualty Company, policy number RDU 186 27 82

issued by Columbia Casualty Company, policy number RDU 186 30 62 issued by Columbia Casualty Company, policy number RDU 365 32 19 issued by Columbia Casualty Company, the policy that was alleged by Fibreboard Corporation to have been issued by Continental Casualty Company in the period 1954-1956, and policy number LAC 88700 found to have been issued by Pacific Indemnity Company to Fibreboard Corporation effective May 4, 1956, and any other policies that were, or may be alleged to have been, issued to Fibreboard Corporation by any of the Insurers, including those set forth in the Pacific Indemnity Agreement.

5. "Insurers" means (i) Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company and all insurance or indemnity companies controlling, controlled by or under common control with any of them and (ii) Pacific Indemnity Company and all insurance or indemnity companies controlling, controlled by or under common control with it.

6. "Personal Injury Asbestos Claim" means: (i) each and every claim, demand, action or suit of any kind for personal injury arising, directly or indirectly, from exposure to asbestos-containing products (including, without limitation, any direct action claim, wrongful death claim, punitive or exemplary damages claim, loss of consortium claim, fear of disease claim, bad faith claim, or surviving personal injury claim), and whether such injury manifested itself heretofore or hereafter, or (ii) any claim, demand, action or suit of any kind arising, directly or indirectly, from any such claim, demand, action or suit referred to in (i) above (including without limitation any bad faith claim, contribution claim, indemnity claim warranty claim, direct action claim or Additional Policy Claim) against Fibreboard, against the Insurance Policies or against the Insurers in any way predicated

on obligations created by the Insurance Policies; provided, however, that a Personal Injury Asbestos Claim shall not include any claim for benefits brought by an employee or his or her personal representative under any federal or state workers compensation statute (including, but not limited to, the United States Longshore and Harbor Workers' Compensation Act and the Federal Employee Compensation Act), but shall include any subrogation, contribution or indemnity claim arising from such claim for benefits.

7. "Settled Claims" mean claims of individuals for asbestos-related personal injuries (a) that are not Class Member Claims and (b) that as of August 27, 1993 had been settled (by Fibreboard Corporation or by Fibreboard Corporation and Continental) or were the subject of a verdict or judgment.

For the purpose of this definition, a claim included within the terms of a settlement agreement (whether written, oral or placed on a court record) prior to August 27, 1993 shall be deemed to have been settled before August 27, 1993 even if (i) an opt-out right with respect to that claim has been or is exercised, or (ii) the settlement is subsequently repudiated by the Plaintiff; provided, however, that no claim which was included within the terms of a settlement agreement and which was not filed prior to August 27, 1993 shall be deemed settled unless it was eligible to be processed and liquidated prior to August 27, 1993.

8. "Unsettled Claims" shall mean claims of individuals for asbestos-related personal injuries brought against Fibreboard in lawsuits filed prior to August 27, 1993 and that are not Settled Claims. For purposes of this definition, "Unsettled Claims" shall include claims of persons who filed and

for cash payment or some other negotiated value dismissed claims against Fibreboard and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy.

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

GERALD AHEARN, ET AL.	§	
	§	
V.	§	CIVIL ACTION
NO. 6:93cv526		
	§	
FIBREBOARD CORPORATION,	§	
ET AL.	§	

August 29, 1995

JUDGMENT ON ATTORNEYS' FEES

In accordance with the Magistrate Judge's Reports and Recommendations and the Court's Orders of August 18, 1995 and August 29, 1995, the Court

Enters Judgment in favor of Joseph F. Rice and Joseph B. Cox, Jr. of the firm Ness Motley Loadholt and Richardson against Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company and Pacific Indemnity Company in the amount off $16,461,391.20 for attorney fees and $ 456,806.57 for expenses.

Enters Judgment in favor of Steven Kazan of the firm Kazan McClaim Edises & Simon, against Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company and Pacific Indemnity Company in the amount of $9,236,515.20 for attorneys fees and $217,729.84 for expenses.

Enters Judgment in favor of Harry F. Wartnick of the firm Wartnick, Chaber, Harowitz, Smith and Tigerman, against

Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company and Pacific Indemnity Company in the amount of $6,855,302.40 for attorneys' fees and $296,658.07 for expenses.

Enters Judgment in favor of Elihu Inselbuch of the firm Caplin and Drysdale, against Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company and Pacific Indemnity Company in the amount of $11,179,504.80 for attorney fees and $251,547.62 for expenses.

Enters Judgment in favor of R. Bruce Shaw of the firm Nelson Mullins Riley and Scarborough, L.L.P., counsel for class representative Owens-Illinois, against the settlement Trust in the amount of $108,563.23 for attorneys' fees and expenses.

Enters Judgment in favor of Richard Josephson and George Shipley of the firm Baker and Botts, counsel for class representative Owens-Illinois, against the settlement Trust in the amount of $186,022.00 for attorneys' fees and $16,818.00 for expenses.

Enters Judgment in favor of Clinton A. Krislov, of the firm Krislov and Associates and Ronald W. Lipton of the firm Stinson, Lupton and Weiss, P.A., counsel for the Longshore Intervenors against the settlement Trust in the amount of $474,954.40 for attorneys' fees and $25,257.56 for expenses.

This Judgment is contingent upon the settlement agreement in *Ahearn v. Fibreboard Corp.*, civil action number 6:93cv526 receiving final judicial approval, and upon any agreement between class counsel.

SIGNED this 29th day of August, 1995.

ROBERT M. PARKER
UNITED STATES CIRCUIT JUDGE
United States Court of Appeals
for the Fifth Circuit
Sitting by Designation

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION
Civil Action No. 6:96CV526

GERALD AHERN, JAMES DENNIS, and	§
CHARLES W. JEEP, On Behalf of	§
Themselves and Others	§
Similarly Situated	§
Plaintiffs,	§
v.	§
	§
FIBREBOARD CORPORATION	§
Defendant,	§
CONTINENTAL CASUALTY COMPANY	§
and PACIFIC INDEMNITY COMPANY	§
Intervenors	§
	§

September 9, 1993

ORDER PROVISIONALLY CERTIFYING CLASS FOR SETTLEMENT PURPOSES

On September 9th, 1993, plaintiffs and intervenors, Continental Casualty Company and Pacific Indemnity Company ("Intervenors"), submitted to this Court a joint motion for provisional certification, for settlement purposes only, that this action may be maintained as a class action, pursuant to Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure, on behalf of a class consisting of certain future claimants. Based on the class action complaint, the answer and counterclaims of Intervenors, the affidavits of Joseph B. Cox, Jr., Meyer G.

Koplow, and Roger M. Trangsrud (and accompanying exhibits), the memorandum of law submitted therewith, and all prior proceedings in this Court, the Court finds that the requested provisional class certification is authorized by Rule 23 of the Federal Rules of Civil Procedure, that the provisional certification will facilitate proceedings in connection with a settlement heretofore agreed upon by the parties to this action and that certification of the proposed class pursuant to Rule 23(b)(1)(B) is appropriate.

IT IS THEREFORE ORDERED that this action is hereby provisionally certified, pursuant to Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure, for settlement purposes only, as a class action on behalf of a class consisting of:

(a) all persons (or their legal representatives) who have been exposed, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member, or any other person), to asbestos or to asbestos-containing products for which Fibreboard may bear legal liability and who have not, before August 27, 1993, filed a lawsuit or settled a claim for asbestos-related personal injury, or damage, or death in any court against Fibreboard or against persons or entities for whose actions or omissions Fibreboard bears legal liability;

(b) all persons (or their legal representatives) exposed to asbestos or to asbestos-containing products, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member, or any other person), who dismissed an action prior to August 27, 1993 without prejudice against Fibreboard, and who retain the right to sue Fibreboard upon development of a nonmalignant disease process or a malignancy; provided, however, that the Class does not

include persons who filed and, for cash payment or some other negotiated value, dismissed claims against Fibreboard, and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy; and

(c) all past, present and future spouses, parents, children, and other relatives (or their legal representatives) of the class members described in paragraphs (a) and (b) above, except for any such person who has, before August 27, 1993, filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) or (b) above in any court against Fibreboard (or against entities for whose actions or omissions Fibreboard bears legal liability).

IT IS FURTHER ORDERED that plaintiffs Gerald Ahern, James Dennis, and Charles W. Jeep are designated as representatives of the class, and that Joseph F. Rice, Joseph B. Cox, Jr., Steven Kazan, Harry F. Wartnick and Robert E. Sweeney are designated as counsel for the class. The law firm of Caplin & Drysdale, Chartered is designated as counsel to the class counsel.

IT IS FURTHER ORDERED that any person wishing to be heard with respect to the provisional class certification ordered herein, or to the final certification of a class of any kind in this matter, will have an opportunity to do so before this Court at the hearing to be held upon the fairness of the settlement.

IT IS FURTHER ORDERED that this provisional certification shall be subject to further Order of the Court.

SIGNED this the 9th day of September, 1993.

ROBERT M. PARKER, CHIEF JUDGE

APPENDIX M

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 95-40635

In re: ASBESTOS LITIGATION

JAMES FLANAGAN, et al.,
Appellants,

VERSUS

GERALD AHEARN, et al.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Texas

ON SUGGESTION FOR REHEARING EN BANC
(Opinion July 26, 1996,
5 Cir., 90 F.3d 963)
(Order Filed Nov. 26, 1996)

Before REAVLEY, DAVIS and SMITH, Circuit Judges.*

PER CURIAM:

The court having been polled at the request of one of its members and a majority of the judges who are in regular active service not having voted in favor (FRAP 35 and Local Rule 35), the suggestions for rehearing en banc are DENIED.

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* Judges King, Higginbotham, Barksdale, Benavides, and Parker are recused and did not participate in the consideration of the suggestions for rehearing en banc. Judge Dennis also did not participate.

JERRY E. SMITH, Circuit Judge, with whom GARWOOD, JOLLY, JONES, EMILIO M. GARZA, and DeMOSS, Circuit Judges, join, dissenting:

I respectfully dissent from the failure of the court to grant rehearing en banc. The result of this litigation, as implemented by the district court and affirmed by the panel majority, is the first no-opt-out, mass-tort, settlement-only, futures only class action ever attempted or approved. The issues presented are worthy of consideration beyond the level of circuit panel review.

Five of the active judges are disqualified from participating in this matter, and a sixth judge has elected not to participate in the consideration of the suggesting for rehearing en banc. Accordingly, it is not possible to determine whether, if all active judges were voting, a majority would decide to rehear this case en banc.

The applicable statute and rules require the affirmative vote of a majority of the active judges--here, nine of the seventeen active judges--for en banc consideration, as recused and non-participating judges are counted as members of the court for purposes of the calculation.[1] The effect in this case is to require not a simple majority, but a supermajority of 82%--nine of the eleven participating judges--to favor reconsideration.

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[1] "Judges in regular active service who are disqualified for any reason or who cannot participate in the decision of an en banc case nevertheless shall be counted as judges in regular active service." 5th Cir. R. 35.6. Under 28 U.S.C. § 46(c), rehearing en banc is "ordered by a majority of the circuit judges of the circuit who are in regular active service." *See* Fed. R. App. P. 35(a); *Shenker v. Baltimore & Ohio R.R.*, 374 U.S. 1, 4-5 (1963); *Western P.R.R. v. Western P.R.R.*, 345 U.S. 247, 250 (1953); *Variable Annuity Life Ins. Co. v. Clark[e]*, 998 F.2d 1295 (5th Cir. 1993), *suggestion for rehearing en banc denied*, 13 F.3d 833, 834 (5th Cir. 1994) (Smith, J. dissenting), *rev'd sub nom. NationsBank v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810 (1995).

That onerous requirement has not been met. Accordingly, the appellants' only recourse, in order to obtain review of the difficult and novel issues presented, is to petition the Supreme Court for writ of certiorari.

APPENDIX N

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 95-40635

In re: ASBESTOS LITIGATION

JAMES FLANAGAN, et al.,
Appellants,

VERSUS

GERALD AHEARN, et al.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Texas

(Order Filed Dec. 3, 1996)

ON SUGGESTION FOR PANEL REHEARING

Before REAVLEY, DAVIS and SMITH, Circuit Judges.*

PER CURIAM:

The application for panel rehearing is DENIED.

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

APPENDIX O

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE INVOLVED

U.S. CONST. ART. III, § 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.

U.S. CONST. AMEND. V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

RULES ENABLING ACT — 28 U.S.C. § 2072(b):

> Such rules shall not abridge, enlarge or modify any substantive right.

RULES OF DECISION ACT — 28 U.S.C. § 1652:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

FED. R. CIV. P. 23:

> **(a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> **(b) Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
> **(1)** the prosecution of separate actions by or against individual members of the class would create a risk of . . .
>
> > **(B)** adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests. . . .

APPENDIX P

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

GERALD AHERN, JAMES DENNIS, and CHARLES W. JEEP, On Behalf of Themselves and Others Similarly Situated, Plaintiffs, v. FIBREBOARD CORPORATION	§	Civil Action No. 6:96CV526

Defendant

CLASS ACTION COMPLAINT

Plaintiffs Gerald Ahern, James Dennis, and Charles W. Jeep, on behalf of themselves and others similarly situated, as and for their class action complaint against Defendant Fibreboard Corporation ("Fibreboard"), allege upon knowledge as to themselves and otherwise upon information and belief as follows:

Jurisdiction

1. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1332. Plaintiffs allege an amount in controversy in excess of $50,000.00, exclusive of Interest and costs, for each of the individual members of the Class.

2. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(a)(2).

Parties

Plaintiffs

3. Plaintiff Gerald Ahern is a resident of South Carolina. Plaintiff Ahern worked on board U. S. Navy ships at the Charleston Air Force Base and at the Charleston Naval Shipyard, Charleston, South Carolina, from the 1940's through the late 1980's. In the course of his employment he was exposed to asbestos-containing products manufactured and/or supplied by Fibreboard and others. As a direct and proximate result of his exposure to asbestos or asbestos-containing products, plaintiff Ahern contracted asbestosis. Plaintiff Ahern has not previously filed a lawsuit or settled any claims against Fibreboard based upon his exposure to asbestos or asbestos-containing products.

4. Plaintiff James Dennis is a resident of South Carolina. Plaintiff Dennis worked as a pipefitter from 1974 to 1988. In the course of his employment, he was exposed to asbestos-containing products manufactured and/or supplied by Fibreboard and others. Plaintiff Dennis has not yet been diagnosed as having an asbestos-related condition. However, as a direct and proximate result of his exposure to asbestos or asbestos-containing products, he has an increased risk of developing a number of malignant and nonmalignant asbestos-related conditions. Plaintiff Dennis has not previously filed a

lawsuit or settled any claims against Fibreboard based upon his exposure to asbestos or asbestos-containing products.

5. Plaintiff Charles W. Jeep is a resident of Missouri. Plaintiff Jeep worked at the Puget Sound Naval Shipyard in the state of Washington from 1944 until 1946. In the course of his employment he was exposed to asbestos-containing products manufactured and/or supplied by Fibreboard and others. As a direct and proximate result of his exposure to asbestos or asbestos-containing products, plaintiff Jeep contracted mesothelioma. Plaintiff Jeep has not previously filed a lawsuit or settled any claims against Fibreboard based upon his exposure to asbestos or asbestos-containing products.

Defendant

6. Defendant Fibreboard is a corporation organized under the laws of Delaware, with its principal place of business in California. Fibreboard is qualified to do, and does, business in Texas.

7. Fibreboard has also done business under the following names: Fibreboard Paper Products Corporation; Fibreboard Products (Eastern Division), Incorporated; Paraffine Companies, Incorporated; Plant Rubber & Asbestos Works; Pabco Products, Incorporated; and Pabco Insulation Corporation. "Defendant" or "Fibreboard" includes each of the above listed entities and each of their respective predecessors and successors in interest, and their respective subsidiary companies and divisions.

Class Action Allegations

The Class

8. Plaintiffs bring this action as a class action pursuant to Fed. R. Civ. P. 23(b)(1)(B) on behalf of themselves and a class of persons similarly situated.

9. The Plaintiff class (the "Class") is defined as follows:

A. All persons (or their legal representatives) who have been exposed, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member, or any other person), to asbestos or asbestos-containing products for which Fibreboard may bear legal liability and who have not, before August 27, 1993, filed a lawsuit or settled a claim for asbestos-related personal injury, or damage, or death in any court against Fibreboard or against persons or entities for whose actions or omissions Fibreboard bears legal liability.

B. All persons (or their legal representatives) exposed to asbestos or to asbestos-containing products, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member, or any other person), who dismissed an action prior to August 27, 1993 without prejudice against Fibreboard, and who retain the right to sue Fibreboard upon development of a nonmalignant disease process or a malignancy; provided, however, that the Class does not include persons

who filed and, for cash payment or some other negotiated value, dismissed claims against Fibreboard, and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignance.

C. All past, present and future spouses, parents, children, and other relatives (or their legal representatives) of the class members described in paragraphs (a) and (b) above, except for any such person who has, before August 27, 1993, filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) or (b) above in any court against Fibreboard (or against entities for whose actions or omissions Fibreboard bears legal liability).

Requirements of Rule 23(a)

10. Numerosity. The Class is sufficiently numerous that joinder of all members is impracticable. Class members likely number in excess of one hundred and fifty thousand.

11. Commonality. Questions of law and fact are common to the Class, including: "state of the art" defense; strict liability; negligence; successor liability; health hazards of asbestos; when Fibreboard became aware or should have become aware of any health risks associated with the use of asbestos products; the steps, if any, taken to lessen those risks; failure to warn; adequacy of warnings; continued availability of punitive damages; the availability of insurance coverage; the appropriate allocation of Fibreboard's assets; and others.

12. Typicality. Claims of the class representatives typify those of the Class generally. All Class members share an interest in reducing litigation costs, maximizing the funds available for recovery, and ensuring the availability of insurance proceeds. These interests predominate over any issues affecting individual Class members.

13. Adequacy of Representation. Named Plaintiffs will fairly and adequately protect the interests of Class members. The interests of the named Plaintiffs are coincident with, and not antagonistic to, those of other members of the Class. In addition, Plaintiffs are represented by experienced and able counsel specifically appointed by this Court to negotiate a settlement and who have previously litigated numerous personal injury cases involving asbestos exposure and the injuries which may arise from such exposure.

Requirements of Rule 23(b)(1)(B)

14. This action is properly maintained as a Class action under Rule 23(b)(1)(B). For the reasons set forth in Paragraphs 15 through 26, the prosecution of separate actions by individual Class Members would create a risk of adjudications with respect to certain individual Class members which would, as a practical matter, be dispositive of the interests of other Class members not parties to the adjudications or which would substantially impair or impede the other Class members' ability to protect their interests, as alleged hereafter.

15. In the past fifteen years, tens of thousands of individuals exposed to asbestos or asbestos-containing products have filed lawsuits in the state and federal courts against Fibreboard and other asbestos manufacturers alleging injury and wrongful death.

16. More than 45,000 asbestos-related injury and wrongful death cases are still pending against Fibreboard.

17. Absent a settlement of Plaintiffs' claims, it is expected that over one hundred and fifty thousand additional asbestos-related cases will be filed against Fibreboard and other parties in future years.

18. Fibreboard's assets are so limited in relation to the pending and potential claims against Fibreboard that Fibreboard cannot pay, absent insurance proceeds, all future asbestos-related claims. Recovery by earlier litigants will likely exhaust Fibreboard's available and projected assets, and would, as practical matter, substantially impair the ability of later claimants to obtain relief.

19. Fibreboard contends that Continental Casualty Company ("Continental") and Pacific Indemnity Company ("Pacific") must indemnify Fibreboard against its liability for asbestos-related injury claims, pursuant to insurance policies issued by those companies in the 1950's. Pacific provided coverage during 1956 and 1957, and Continental provided coverage from 1957 to 1959.

20. Fibreboard has vigorously litigated its right to indemnity. In In re Asbestos Insurance Coverage Cases, (Included Action: Fireman's Fund v. Fibreboard Corporation, et al.) (Judicial Council Coordination Proceeding No. 1072), Superior Court of the State of California, City and County of San Francisco, Judge Ira Brown rendered judgment in favor of Fibreboard, in one of the most sweeping asbestos insurance coverage rulings to date. Judge Brown ruled that Continental and Pacific must indemnify Fibreboard in full for all liability to any claimant first exposed to asbestos any time prior to or

during their respective policy periods, even if that claimant did not manifest any disease until years later. That judgment is currently on appeal in the California Court of Appeal.

21. Both Continental and Pacific continue to deny coverage under the policies.

22. Absent indemnification from Continental or Pacific, Fibreboard is likely to be rendered insolvent by pending asbestos litigations, and unable to compensate Class members for asbestos-related injuries.

23. Even if Fibreboard ultimately prevails on appeal and obtains indemnity for claimants first exposed to asbestos prior to 1959, Fibreboard still would face financial uncertainty because of liability to individuals first exposed to asbestos after 1959. Fbreboard has entered into an agreement with Pacific that could provide funds for these individuals, but availability of these funds under that agreement is subject to challenge by Continental. Moreover, judgments for punitive damages in many jurisdictions would not be covered by the Continental or Pacific policies.

24. Unless Fibreboard settles its coverage disputes in a manner that ensures indemnification for asbestos claimants against Fibreboard, there is a substantial risk that Fibreboard will be rendered insolvent and asbestos claimants against Fibreboard will be left with no relief whatsoever.

The Proposed Settlement

25. In light of Fibreboard's limited assets, the unresolved issue of insurance coverage, and the expense of duplicative and protracted litigation, there is substantial risk that

adjudications with respect to individual Class members' claims will, as a practical matter, be dispositive of the claims and interests of other similarly situated Class members, or will substantially impair or impede the ability of Class members with unadjudicated claims to protect their interests.

26. On August 27, 1993, Fibreboard, Continental, Pacific, and negotiating counsel appointed by this Court to represent a "futures class" reached an agreement in principle, a proposed settlement, whereby Continental and Pacific have agreed to provide funds in excess of $1.5 billion to create a trust to compensate future asbestos claimants. In addition, Fibreboard has agreed to make an additional contribution to fund later years of the settlement trust. Those funds will provide a fair mechanism for settlement of the Class members' claims.

LIABILITY ALLEGATIONS

COUNT I: Negligent Failure to Warn

27. Plaintiffs incorporate herein by reference their allegations in Paragraphs 1 through 26 above.

28. Fibreboard, during all the times relevant hereto, caused asbestos-containing products to be placed in the stream of commerce with the result that all Plaintiffs and their decedents, and those similarly situated, were exposed, occupationally, paraoccupationally or through the exposure of a spouse or household member to asbestos fibers and dust emitted by those products.

29. As the proximate result of exposure to and the inhalation of asbestos fibers and dust of asbestos-containing

products, Plaintiffs and their decedents, and those similarly situated, have suffered or have an increased risk of developing injuries, including cellular changes in their lungs and other organs; diminished ability of their bodies to resist asbestos-related conditions; contraction of asbestos-related conditions, including, but not limited to, pleural thickening, pleural plaques, asbestosis, respiratory and other cancers, and mesothelioma; and enhanced risk of contracting such conditions in the future; emotional distress arising out of asbestos-related conditions or the fear of future asbestos-related conditions, and the necessity to undergo medical surveillance in order to detect the onset of any future asbestos-related conditions. As a proximate result of these injuries, Plaintiffs, their decedents, and those similarly situated to them, or some of them, have suffered further losses and injuries, such as lost wages, past and future medical expenses, funeral and burial expenses, loss of support, loss of consortium, pain and suffering, emotional distress, loss of life's pleasures, and loss of society.

30. During all times relevant hereto, Fibreboard knew or should have known of the dangers that exposure to its asbestos-containing products could cause conditions such as pleural thickening, pleural plaques, asbestosis, respiratory and other cancers, and mesothelioma in all Plaintiffs and their decedents, and those similarly situated to them.

31. During all times relevant hereto, Fibreboard failed to take reasonable steps to provide all Plaintiffs, their decedents, and those similarly situated to them, (a) adequate warnings of the known or potential dangers from exposure to its asbestos or asbestos-containing products and (b) adequate instructions on how to safely use its asbestos or asbestos-containing products so as to reduce the risk of asbestos-related conditions. The failure by Fibreboard to provide such warnings

and instructions constitutes negligence and proximately caused the injuries or potential injuries to Plaintiffs, their decedents, and those similarly situated to them as described above.

32. The failure of Fibreboard to provide Plaintiffs and those similarly situated to them with both adequate warnings of the danger from exposure to its asbestos or asbestos-containing products and adequate instructions on how to use its asbestos or asbestos-containing products so as to reduce the danger was reckless, wanton, and willful and in conscious disregard of Plaintiffs' safety and health.

COUNT II: Strict Liability

33. Plaintiffs incorporate herein by reference their allegations in Paragraphs 1 through 32 above.

34. The asbestos-containing products manufactured, produced, marketed, or sold by Fibreboard were defective and unreasonably dangerous to human health (a) because they were sold without any warnings or adequate warnings as to their dangers and without adequate instructions on how to use the products to as to reduce those dangers, or (b) because Fibreboard failed to develop alternative products with safer designs even though such products were feasible. Those defects were the proximate cause of the injuries to Plaintiffs and those similarly situated to them, as described in Count I.

35. The manufacture, production, marketing, and sale by Fibreboard of asbestos-containing products was reckless, wanton and willful and in conscious disregard of the safety and health of Plaintiffs and those similarly situated to them.

COUNT III: Breach of Express and Implied Warranty

36. Plaintiffs incorporate herein by reference their allegation in Paragraphs 1 through 35, above.

37. Fibreboard has breached express, as well as implied, warranties of good and merchantable quality and fitness for intended use with respect to its asbestos-containing products.

38. The breach of those warranties has proximately caused injury to Plaintiffs and those similarly situated to them, as described in Count I.

COUNT IV: Concert of Action and Conspiracy

39. Plaintiffs incorporate herein by reference their allegations in Paragraphs 1 through 38 above.

40. During all relevant times herein, Fibreboard acted in concert and as part of a conspiracy with other parties to withhold adequate warnings of the known and potential dangers from exposure to asbestos or asbestos-containing products.

41. As a result of this concert of action and conspiracy, Plaintiffs have suffered or have an increased risk of suffering injuries.

COUNT V: All Other Viable Claims

42. Plaintiffs incorporate herein by reference their allegations in Paragraphs 1 through 41, above.

43. Plaintiffs allege and assert that each and every recognized claim or cause of action against Fibreboard arising from or related to exposure of asbestos-containing products, and claim all relief, legal or equitable, available to them.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court grant plaintiffs and the other members of the class the following relief:

A. General and special compensatory damages determined to have been sustained by each of them respectively;
B. Punitive damages from Fibreboard in an amount to be determined;
C. The costs of this suit;
D. Appropriate declarations and orders; and
E. Other relief as may be deemed just and proper.

DATED: September 9, 1993

Respectfully submitted,

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Joseph B. Cox, Jr.

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CLASS

APPENDIX Q

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION
Civil Action No. 6:96CV526

GERALD AHERN, JAMES DENNIS, and	§
CHARLES W. JEEP, On Behalf of	§
Themselves and Others	§
Similarly Situated	§
	§
Plaintiffs,	§
	§
v.	§
	§
FIBREBOARD CORPORATION	§
	§
Defendant	§
	§
CONTINENTAL CASUALTY COMPANY	§
	§
and	§
	§
PACIFIC INDEMNITY COMPANY	§
	§
Applicants for Intervention	§

**MOTION FOR LEAVE TO INTERVENE
BY CONTINENTAL CASUALTY COMPANY
AND PACIFIC INDEMNITY COMPANY**

COME NOW Continental Casualty Company and Pacific Indemnity Company ("Intervenors") and move for leave to intervene in this action in order to assert the defenses and claims as set forth in their proposed pleading, a copy of which is attached to this motion, and, in support of the motion, would respectfully state as follows:

1. Intervenors are the parties identified in the Plaintiffs' Complaint who allegedly indemnify the Defendant, Fibreboard Corporation, for any liability for asbestos-related injuries, pursuant to insurance policies issued in the 1950's as construed in certain coverage litigation involving those policies entitled In re Asbestos Insurance Coverage Included Action: Fireman's Fund v. Fibreboard Corporation, etal.) (Judicial Council Coordination Proceeding No. 1072), Superior Court of State of California, City and County of San Francisco, J. Brown presiding). As such,

Intervenors have an interest relating to the property and/or transaction which is the subject matter of the above-entitled action.

2. The proposed pleading of the Intervenors asserts defenses and claims regarding Plaintiffs' Complaint which have not yet been presented by the defendant and their interest in the proceedings will not and cannot be adequately represented by the present parties.

3. Intervenors are so situated that the disposition of this action may as a practical matter impair or impede Intervenors' ability to protect their interests.

4. Intervenors have defenses and claims relating to the Plaintiffs' Complaint raising questions of law or fact which are common to the main action.

5. Intervenors assert that to allow such intervention will not result in undue delay to the original parties to the proceeding.

6. Attached to this motion is the Intervenors' pleading setting forth the defenses and claims for which intervention is sought.

WHEREFORE, Continental Casualty Company and Pacific Indemnity Company respectfully pray that they be granted leave by this Court to intervene in the above-referenced action and for such other and further relief as may be deemed just and proper.

Dated: September 9, 1993

Respectfully submitted,

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APPENDIX R

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Civil Action No. 6:96CV526

GERALD AHERN, JAMES DENNIS, and CHARLES W. JEEP, On Behalf of Themselves and Others Similarly Situated	§
Plaintiffs,	§
v.	§
FIBREBOARD CORPORATION	§
Defendant	§
CONTINENTAL CASUALTY COMPANY and PACIFIC INDEMNITY COMPANY	§
Applicants for Intervention	§

JOINT MOTION FOR PROVISIONAL CLASS CERTIFICATION

Upon the accompanying class action complaint, the affidavits of Meyer G. Koplow, Roger M. Trangsrud and Joseph

B. Cox, Jr. (and the exhibits attached thereto), and the accompanying memorandum of law, and the grounds set forth therein, named class representatives Gerald Ahern, James Dennis, and Charles W. Jeep, and intervenors Continental Casualty Company and Pacific Indemnity Company, hereby jointly move for an order, pursuant to Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure, for provisional certification of a class, as defined in Paragraph 9 of the Complaint in the above-captioned action, for purposed of settlement only, and for such other and further relief as the Court may deem just and proper.

Dated: September 9, 1993

Respectfully submitted,

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APPENDIX S

Excerpts from Testimony of
Fibreboard Counsel Stephen Snyder
Page 143, Line 14

MR.MILLER: Thank you, Your Honor.

Q. At the time Fibreboard entered into the Asbestos Claims Facility, could you explain how it viewed the need to control filings of new cases, et cetera, and how that was affected its thinking?

A. Fibreboard was settling policies to get into the facility, and it still had policies in -- in process in the coverage litigation. I believe that many defendants saw the Asbestos Claims Facility as a surrogate for Johns-Manville, a big powerful organization that they could belong to that would control something that seemed to be starting to get out of control. So what Fibreboard looked for mainly when it went into the facility, I believe, at that time was a chance to exercise some influence on dockets, to do something about the number of cases that were coming on the dockets where there didn't seem to be any disease, and to keep the defense costs and the values within reasonable limits. And it was -- it was going to be through the bargaining ability of the facility to settle cases on large numbers of defendants -- for large numbers of defendants that the facility hopefully would be able to exercise that control and keep the litigation within rein.

Q. At the time Fibreboard entered the facility, would you explain the corporate goal which was described by some

in opening statements with respect to managing and resolving the asbestos litigation?

A. It had been Fibreboard's corporate goal for some time to manage and resolve its asbestos liabilities within its available insurance resources. That was a principle that was etched onto the forehead of every asbestos lawyer that worked for Fibreboard and had been for years. Fibreboard was spending, for a company of its size, and enormous resources out of its cash, because it had to pay lawyers to prosecute its coverage litigation, and the goal that it had in mind was this deliverance that it would get if it was successful.

APPENDIX T

Excerpts from Testimony of
CNA Counsel Meyer Koplow
Page 1557, Line 1

Q. I want to turn to another brief subject, Mr. Koplow, that has to do with the legal ethics area. You are aware that one of the objectors has presented testimony, at least in deposition, and will present testimony here with respect to legal ethics issues? Are you aware of that, sir?

A. Yes, I am.

Q. In addressing one area that was discussed with that expert, did there ever come a time that CNA on its own behalf or Continental and Pacific together determined that there was one cap amount of money available to be split between the presents and future claimants?

A. No, I don't think it would be fair to say that there was a time when the insurers concluded there was one capped amount of money.

Q. So there was no direct competition at any time between so-called present claimants or future claimants for individual dollars that were available from the insurers, is that correct?

MR. BARON: Your Honor, I object to that one. I don't believe he's laid a foundation for it.

THE COURT: Overruled.

A. With the caveat that there was obviously some overall cost to the insurers that they ultimately would conclude they weren't prepared to exceed, I did not view the present claimants and the future claimants as being in direct competition.

MR. INSELBUCH:

Q. Indeed, as you sit here today, you do not know what the sum total of the expenses for the insurers will be; isn't that correct?

A. Unhappily, that is correct.

Q. And neither does Mr. Bschorr, isn't that correct?

A. I'd be shocked if Mr. Bschorr had better information on this than we did.

Q. Are you of a view one way or the other whether the plaintiffs' class of future claimants would have been better served had they been represented by lawyers, competent, able, hard-working lawyers who had no other involvement in asbestos cases rather than lawyers who indeed had involvement, even current involvement, in asbestos cases?

A. While I have no empirical data to support my view, I am confident that had we been dealing with counsel that did not have both the experience and leverage that this counsel had, that we would have been able to negotiate a deal that would have been less expensive to the insurers.

Q. Finally, I think you forgot one of the assets that does come into the trust. Do you recall under the global settlement agreement, if and when it is approved, that Fibreboard also was to assign to the trust any claims for contribution it might have that result from any and all present claims?

A. I -- I had forgotten that. That is correct, that's one of the trust assets.

MR. INSELBUCH: That's all I have, Your Honor.

APPENDIX U

Excerpts from Testimony of
Class Counsel Harry Wartnick
Page 684, Line 21

Q. Now, Mr. Wartnick, do you know one way or the other whether a trilateral or bilateral agreement would have been reached but for the conclusion of global settlement talks?

A. I don't know that.

Q. Okay. You can't testify one way or the other on that one, can you?

A. No, sir.

Q. All right. Mr. Wartnick, you never intended to file a class action lawsuit in a case such as this without an agreement in place, did you?

A. I wouldn't. I certainly had no intention to file a contested or a litigated class action lawsuit against Fibreboard during this process, that is correct.

Q. Okay. In other words, but for an agreement with Fibreboard, you would not have participated in a class action litigation against them; is that right?

A. I had no intention to file a litigated class action against them throughout this process, that is correct.

Q. All right. Now, in the event, however likely, that the global is disapproved by either this court or by another court, do you contemplate that this case will be dismissed?

A. I believe that applications will be made to the court to dismiss this action by Fibreboard and others. Whether it's actually dismissed is up to the court.

Q. Will you contest those motions to dismiss?

THE COURT: What does that have to do with any decision this court has to make?

MR. BARON: Mr. Wartnick knows. Your Honor, it goes to Article III, Section 2 of the Constitution, the power of this court at all to prosecute this case, if indeed this is a case.

THE COURT: The court has some passing familiarity with Article III. I see no relevance whatsoever to that line of questioning. Go ahead.

APPENDIX V

TRUST DISTRIBUTION PROCESS

Annex A to the Trust Agreement

This Trust Distribution Process creates the procedures for submitting, processing and paying Class Member Claims and Third-Party Claims. Capitalized terms used in this Trust Distribution Process are defined herein or in the Glossary.

A. Overview

The primary goal of the Trust is fair and equitable treatment for all Beneficiaries consistent with Trust resources. This Trust Distribution Process furthers that goal by establishing procedures that are intended to process and evaluate Class Member Claims of Beneficiaries impartially, pay all Class Member Claims over time, and maintain reasonable reserves for any Class Member Claims in excess of projections. The Trustees shall implement and administer this Trust Distribution Process in accordance with their duties under the Trust Agreement.

The claims resolution process begins with a proof of claim. The Trust then makes a determination whether the claim meets the criteria for any of the five Scheduled Diseases: Mesothelioma, Lung Cancer, Other Cancer, Asbestos Lung Disease I ("ALD-1") and Asbestos lung Disease II ("ALD-2"). If the claim meets the criteria for a Scheduled Disease, it will be evaluated based on factors that have significance in the resolution of similar claims by settlement or trial, including but not limited to the factors set forth in Schedule A hereto. If the

claim does not meet the criteria for one of the Scheduled Diseases, the Trust will evaluate whether it nonetheless asserts a compensable claim for an asbestos-related injury.

After evaluation, the Trust will make a good faith settlement offer or advise the Beneficiary of the reasons for rejecting the claim. The Beneficiary may either accept or reject the offer or negotiate further with the Trust. If the Beneficiary rejects the Trust's offer, he or she may submit supplemental information to the Trust and have his or her claim reevaluated by the Trust and/or negotiate further with the Trust. If negotiation with the Trust fails, the Beneficiary shall, if he or she wishes to pursue the claim, proceed to mediation and then to binding or nonbinding arbitration. Beneficiaries may bring an action against the Trust in the tort system only after they have participated in good faith in both mediation and nonbinding arbitration and have rejected the award in a nonbinding arbitration.

Beneficiaries must also appear at a mandatory settlement conference under the auspices of the Court before proceeding to the tort system. If a Beneficiary rejects settlement following the settlement conference, he or she may elect immediate binding arbitration or exit to the tort system. No punitive damages, pre-judgment or post-judgment interest, damages for risk of cancer, or compensatory damages beyond Fibreboard's own share will be allowable in the tort system. Judgments may be collected only as provided in this Trust Distribution Process.

Similar claims-handling procedures (described in Section H below) apply to certain Third-Party Claims including those of Defendant Class Members who succeed to Class Member Claims.

Class Member Claims and Third-Party Claims will be eligible for payment once they are Liquidated, whether by settlement, arbitration, or judgment. Judgments or claims settled after exit to the tort system will normally be paid out over a five-year period, while claims resolved without resort to the tort system will normally be paid over a three-year period. Total payments from the Trust in each year for Trust Expenses, Class Member Claims and Third-Party Claims are limited to the amounts set forth in Section E. While the Trust is expected to be able to pay all claims as Liquidated yearly, if amounts available are insufficient to make all payments due on Liquidated claims in any year, claims for Mesothelioma and Lung Cancer will be paid first, then Other Cancer and ALD-1 claims, then ALD-2 claims, and then Residual Claims, whether any such claims have been Liquidated by settlement, arbitration or judgment. Within each of those categories, claims will be paid in the order of the date on which a release is received by the Trust (for settled claims), an arbitration ruling is rendered (for claims resolved through arbitration) or a judgment becomes final (for claims resolved in the tort system). Class Member Claims and Third Party Claims which cannot be paid because the amount available for that year is insufficient to make all payments due on such claims will be deferred for payment (FIFO within their payment categories) until the following year.

B. The Claim Procedure

1. **Submitting a Claim.** Other than Interim Claims submitted pursuant to Article 7 of the Global Settlement Agreement, commencing on February 14, 1994, any Beneficiary may submit a claim to the Trust. To do so, the Beneficiary shall

provide to the Trust, on forms approved by the Trustees and the SCB, a proof of claim including at least the following information concerning the Exposed Person: name, address, social security number, date of birth, date of death (if applicable), marital status and number and age of dependents, spouse's name and social security number, occupation, smoking history, year of first exposure to any asbestos or asbestos-containing products, identification and source of identification of asbestos-containing products manufactured or supplied by Fibreboard to which the Exposed Person was exposed, the work sites where the Exposed Person was exposed to asbestos or to Fibreboard asbestos, the years of such exposures including specific descriptive comments concerning the duration and intensity of such exposure, the status of related workers compensation or civil litigation regarding asbestos exposure, and the Scheduled Disease, if any, for which the Beneficiary believes the claim qualifies or a statement of the disease or injury the Beneficiary asserts he or she has if he or she does not believe he or she qualifies for a Scheduled Disease. In addition, the Beneficiary shall provide the Trust with a Medical Report, a PFT Report and a B-reader Report, and, in Malignancy Claims, a pathology report (where available).

2. **Expedited Review Option.** The Trust may establish a process for expedited review of ALD-2 claims by persons desiring an accelerated settlement of their claim at a fixed amount ("Expedited Review Claims"). A Beneficiary seeking such expedited review shall submit an abbreviated proof of claim for expedited review by the Trust. The abbreviated proof of claim shall provide the following information concerning the Exposed Person: name, address, social security number, date of birth, date of death (if applicable), marital status, spouse's name and social security number, occupation, the Scheduled Disease for which the Beneficiary believes the

claim qualifies, the work sites where the Exposed Person was exposed to asbestos or to Fibreboard asbestos and such information requested by the Trust that adequately demonstrates exposure to asbestos or asbestos-containing products and to Fibreboard asbestos or asbestos-containing products. In addition, the Beneficiary shall supply the Trust with a Medical Report. The Trust will expeditiously review the abbreviated proof of claim and may, but is not required to, offer to settle such Expedited Review Claims for a single fixed cash payment of an amount and on a time schedule established from time to time by the Trust. If the Trust determines not to offer to settle an Expedited Review claim, the Beneficiary may submit a proof of claim as set forth in Section B.1.

The Trust may establish additional categories of Expedited Review Claims with differing fixed cash payments and differing information requirements. In addition, the Trust may eliminate or suspend the Expedited Review Claim option for one or more categories of Class Member Claims if it determines that such option is encouraging the filing of claims that would not otherwise be eligible for payment under these procedures or is using a disproportionate share of the Trust's assets.

3. **Ordering of Claims for Processing.** Claims shall be ordered for processing by the Trust in the manner described in this Section. As a general practice, the Trust shall review its claims files on a regular basis and notify all Beneficiaries whose claims are likely to be processed in the near future. A Beneficiary's position in the FIFO queue for processing will be determined by the date of receipt by the Trust of a properly completed proof of claim form, and among claims received the same day, by the date of diagnosis of the disease on which the claim is based. Where the Beneficiary has filed an

incomplete proof of claim, the Trust shall notify the Beneficiary of the need for additional information and shall not process the claim until the file is complete. A Beneficiary shall not receive a position in the FIFO processing queue until his or her proof of claim is properly completed.

4. **Initial Evaluation of Claims.** As a proof of claim is reached in the FIFO queue, the Trust shall evaluate it to determine whether the claim qualifies as one of the five Scheduled Diseases. A Beneficiary's right to assert a valid claim for an asbestos-related injury or disease is in no way prejudiced by failure of his or her asbestos-related injury or disease to qualify as one of the Scheduled Diseases. If a Scheduled Disease is determined to exist, the Trust shall evaluate the Beneficiary's claim using factors relevant to the resolution of asbestos claims for that Scheduled Disease by settlement or trial, including the factors set forth in Schedule A hereto. If the Trust concludes that the Beneficiary's injury or disease does not meet the criteria for a Scheduled Disease, it shall determine whether the Beneficiary nonetheless asserts a meritorious claim for an asbestos-related injury or disease and shall evaluate the claim using factors relevant to the resolution of similar claims by settlement or trial. If the Trust accepts for disposition a claim with respect to a disease which is not a Scheduled Disease, the Trust shall place it in a Schedule Category based on which Scheduled Disease it most closely resembles.

In addition to the medical evidence which Beneficiaries are required to submit with the initial proof of claim or submit as part of any supplemental information she has submitted to the Trust all medical reports relating to any alleged asbestos-related condition other than those subject to attorney work product privilege. If the Beneficiary submits supplemental information to the Trust, the Trust shall reevaluate the claim and

either make a written good faith settlement offer or reject the claim. The Beneficiary shall then reject or accept any offer based on reevaluation using the procedures outlined above for rejection or acceptance of the Trust's initial offer. If the Beneficiary rejects such offer, he or she may elect to negotiate further with the Trust or shall proceed to mediation.

6. **Second (Malignant) Injury Claims.** The Trust shall offer to settle Non-Malignancy Claims on two alternative bases: 1) in exchange for a general release; or 2) in exchange for a limited release covering all asbestos-related personal injury claims other than subsequent Malignancy Claims. The Trust's settlement offer for a limited release shall be the amount of its offer for the general release minus the lesser of: 1) half of its settlement offer for the general release; and 2) $1,750. If a Beneficiary accepts the Trust's offer of a limited release, the Trust shall account for the monetary difference between its settlement offer for the general release and its settlement offer for the limited release in a separate account. A Second Injury Claim shall be ordered in the FIFO queue for processing based upon the date of receipt by the Trust of the Second Injury Claim, and shall be treated as a new claim under this Trust Distribution Process.

7. **Audit Procedures.** In all cases, the Trust may require that medical x-rays, tests, laboratory examinations and other medical evidence comply with recognized medical standards regarding equipment, testing methods, and procedures to assure that such evidence is reliable. The Trust may develop methods for auditing the reliability of all data submitted in support of claims, including product identification and medical evidence, and may require independent interpretation of CT scans, X-rays, pathology specimens or other physical evidence. If its audits show an unacceptable level of reliability for evidence

submitted from specific individuals or institutions, the Trust may refuse to accept evidence from them. In addition, the Trust may develop methods for auditing other types of evidence necessary to support a claim.

8. **Exigent Health and Extreme Hardship Claims.** Notwithstanding the FIFO order processing rules described in Sections B.2 through B.4, the Trust may process and Liquidate Extreme Hardship Claims and Exigent Health Claims at any time.

The Trust shall establish procedures to expedite its processing, evaluation and negotiation of Exigent Health Claims and Extreme Hardship Claims as well as the ADR procedures the Beneficiary asserting such a claim shall be required to follow under Section C. Such expedited procedures shall be designed to allow all Exigent Health Claims to be Liquidated within six months of presentation of a properly completed proof of claim to the Trust, and to ensure, to the maximum extent practicable, that in jurisdictions in which Beneficiaries can obtain accelerated trial dates for Exigent Health Claims, the Trust's negotiation process and the ADR procedures can be completed before a trial of an Exigent Health claimant's case against Defendant Class Members.

If the Trust determines, in its sole discretion, that a Beneficiary asserting an Extreme Hardship Claim needs greater financial assistance than would be afforded by the payout scheme set forth in Section F.3, the Trust may accelerate payment to the Beneficiary of part or all of the amount for which that claim has been Liquidated as the Trust deems appropriate. Payments with respect to Exigent Health Claims shall be made only in accordance with the payout scheme set forth in Section F.3.

9. **Withdrawal of Claims.** If the Beneficiary does not respond to the Trust's offer on initial evaluation or reevaluation within 30 days, the Trust's offer and the claim shall be deemed to be withdrawn without prejudice unless the Beneficiary has requested in writing one or more extensions of time, not to exceed six months in the aggregate, within which to respond to the offer. If the Beneficiary still has not responded to the Trust's offer at the end of the extension period, the Trust's offer and the claim shall then be deemed to be withdrawn without prejudice. A Beneficiary may also elect to withdraw a claim at any time without prejudice. A claim that is withdrawn or deemed to have been withdrawn may be resubmitted at any time, and shall be reordered in the FIFO queue for processing based on the date of receipt by the Trust of a properly completed proof of claim with respect to the refiled claim.

C. ADR Procedures.

1. **Mediation.** If the Beneficiary chooses not to submit supplemental information or rejects the Trust's offer based on its evaluation of such supplemental information and elects not to negotiate further with the Trust, the Beneficiary's claim shall be referred to mediation. The Trust shall establish and maintain a list of Qualified Mediators, compensated by the Trust. The Trust shall refer claims to Qualified Mediators from the list in rotation as soon as practicable after being notified by the claimant that he wishes to proceed to mediation.

Claims shall be handled by each mediator in the order received by him or her, to the extent practicable. Any party may be represented by legal counsel. The mediator shall confer with the parties and/or their legal representatives, individually and jointly. Such conference may be in person or by telephone, at the claimant's election. The Beneficiary and a

representative of the Trust with settlement authority must personally participate in the conference unless, in the judgment of the mediator, the Beneficiary's physical aor psychological condition precludes such participation. Such conference shall be in the nature of a settlement conference. The mediator shall review the claim and the positions of the parties, the prior negotiations between the parties, the offer(s) and demand(s), such information as the parties may wish to submit as to a fair and equitable settlement, and all documents and medical reports relevant to the claim. At least five days prior to the mediation conference, Beneficiary and the Trust shall each submit to a mediator a concise, confidential statement outlining the Beneficiary's medical condition, exposure to Fibreboard's products and each party's position on settlement value. The mediator shall work with both sides toward reaching an acceptable, reasonable settlement. The mediator does not have the authority to impose a settlement on the parties.

2. **Arbitration.** If the Beneficiary is unable to settle his or her claim with the Trust within 30 days of the mediation conference, the Beneficiary shall, if he or she wishes to pursue the claim, proceed to arbitration of the claim. The arbitration shall be commenced by a written demand for arbitration by the Beneficiary served on the Trust within 45 days of the mediation conference. Such arbitration shall be binding or nonbinding at the election of the Beneficiary, which election must be made in the Beneficiary's written demand for arbitration. The Trust and the Beneficiary shall bear their own fees and costs, except that the Trust shall pay the administrative fees and costs of conducting the arbitration unless the arbitrator in his or her sole discretion assesses such administrative fees and costs against any Beneficiary for delaying or abusing the arbitration procedures.

The Trust shall maintain a list of Qualified Arbitrators. Arbitrations shall be conducted by a single Qualified Arbitrator. The Beneficiary and the Trust shall attempt to agree on a Qualified Arbitrator who will preferably, but not necessarily, be selected from the list maintained by the Trust. If the parties cannot agree on a Qualified Arbitrator, a Qualified Arbitrator shall be selected pursuant to procedures of an independent arbitration facility to be selected by the Trust or by such other procedures as may be adopted by the Trust. The parties shall provide the Qualified Arbitrator and each other with copies of all relevant materials concerning the claim and any supplementary information they wish the Qualified Arbitrator to consider not less than 30 days prior to the date of the arbitration hearing. The Qualified Arbitrator may require the parties to submit such additional information as he or she deems necessary. The Qualified Arbitrator shall conduct a hearing on the claim at which testimony may be offered, unless both parties agree to waive such hearing. In nonbinding arbitrations, the Beneficiary must attend the hearing in person, unless in the judgment of the Qualified Arbitrator his or her physical or psychological condition makes such attendance impossible. The Qualified Arbitrator shall issue an award promptly but in no event later than 120 days from the date on which he or she receives the last submission of information from either of the parties relevant to the claim, unless the parties agree to extend such time. The Award shall be based on the same factors used by the Trust in evaluating claims.

If the Beneficiary elected binding arbitration at the time of the demand, neither party shall have the right to appeal the award other than on grounds set forth in the Federal Arbitration Act. If the Beneficiary elected nonbinding arbitration at the time of the demand, the award shall become final and binding if the Beneficiary does not reject the award by

so notifying the Trust in writing within 30 days after receipt of the award. If the Beneficiary does not reject the award as provided above, he or she shall be deemed to have accepted it. If the Beneficiary rejects the award, the award shall not be binding on either party and the Beneficiary may proceed to the tort system under the procedures set forth below.

3. **Location for ADR Procedures.** The Trust shall establish procedures to conduct mediations and arbitrations at scheduled intervals at such locations around the United States as the Trust determines will be convenient to the largest numbers of claimants and will not impose undue burden on the Trust.

D. Litigation.

A Beneficiary may not proceed to litigate his or her claim against the Trust in the tort system unless he or she has in good faith: (1) submitted a proof of claim and rejected the resulting settlement offer from the Trust; (2) participated in a mediation conference and failed to settle his or her claim; (3) participated in nonbinding arbitration and rejected the resulting arbitration award; and (4) participated in a mandatory settlement conference as described below. The following procedures shall govern any Beneficiary who elects to litigate in the tort system his or her claim against the Trust.

1. **Mandatory Settlement Conference.** Before any Beneficiary may proceed to the tort system, the Beneficiary must request the Court to conduct a mandatory settlement conference with respect to the claim. This mandatory settlement conference may be conducted by the Court, or by another judge or a neutral special master designated by the Court, or, if both the Beneficiary and the Trust agree, by a mutually selected,

neutral third party other than the Court (the "Settlement Conference Designee"). The settlement conference may be conducted by telephone unless the Court or the Settlement Conference Designee determines, on application by the Trust or the Beneficiary, that the conference should be conducted in person. If the Court or the Settlement Conference Designee so determines, the settlement conference must be attended in person by the Beneficiary, unless in the judgment of the Court or the Settlement Conference Designee his or her physical or psychological condition makes such attendance impossible, and by a representative of the Trust with settlement authority at such location as the Court or the Settlement Conference Designee shall determine. If no settlement is reached within 30 days of the mandatory settlement conference, the Beneficiary and the Trust shall submit to each other on that date a written settlement offer that will remain in effect for an additional 30 days. If neither party accepts the other party's settlement offer during this period, then the Beneficiary may, upon certification from the Court or the Settlement Conference Designee that the Beneficiary has completed the settlement conference process and otherwise has complied with the requirements of the preceding paragraph of this Section D, commence a lawsuit against the Trust in the tort system or elect binding arbitration.

2. **Procedural Rules.**

a. Any Beneficiary who elects binding arbitration following the mandatory settlement conference shall follow the procedures set forth in Section C.2 above. Payment of any resulting award shall, however, be governed by Section F of this Trust Distribution Process.

b. Any Beneficiary who elects to resolve a claim through the tort system may pursue the claim in any appropriate forum, subject to the procedures set forth herein. Payment of any resulting judgment shall, however, be governed by Section F of this Trust Distribution Process.

c. The Trust may assert any and all defenses available to it or which would have been available to any Trustor against which the claim could have been asserted absent Global Approval Judgment with respect to Beneficiaries who elect to resolve their claims through the tort system.

d. In no event shall a Beneficiary be permitted to seek or recover from the Trust in a lawsuit in the tort system any punitive or exemplary damages of any sort. Nor may any claimant seek or recover compensatory damages in excess of Fibreboard's actual share of responsibility or for the actual percentage risk of contracting cancer. Finally, no Beneficiary may seek or recover pre-judgment interest in a suit in the tort system. Any other damages available under the applicable law shall remain recoverable except as provided in Section D.2.e below.

e. In no event shall the Trust or any other Person be required to post a bond to stay collection of a judgment in the tort system. Judgments shall be paid by the Trust in the order set forth in Section F below, and no Beneficiary shall be permitted to take any steps to collect a judgment from the Trust except as set forth in this Trust Distribution Process. The Trust shall not be responsible to pay post-judgment interest; in lieu thereof, the procedures set forth in the last sentence of Section F.1 shall apply.

f. (i) The death of a Beneficiary after he or she has filed a proof of claim with the Trust shall not eliminate compensable elements of his or her claim accruing prior to the date of death, by, for example, eliminating any claim for damages for pain and suffering occurring prior to the date of death or by creating an offset to a lost earnings award for personal consumption occurring prior to the date of death, notwithstanding applicable state law to the contrary. (ii) However, such compensable elements may not be recovered after exit to the tort system unless the Beneficiary shows that he or she could have recovered such damages absent compliance with the requirements of the Trust Distribution Process.

g. At trial the defendant shall be the Trust and the Trust and Beneficiary shall jointly request that the Trust be introduced to the trier of fact (judge or jury as the case may be) in the following fashion or in another substantially similar fashion as the trial court may direct, in addition to any other evidence permitted by the Court about the Trust's identity, goals and operations:

> Members of the jury, this is an action for damages for [personal injury/wrongful death] brought by plaintiff[s] against [various defendants, including] the Fibreboard Asbestos Compensation Trust. The Fibreboard Asbestos Compensation Trust was created by Order of a United States District Court to provide fair and equitable treatment for persons with asbestos injury for which Fibreboard Corporation might bear legal liability. The Trust has a fixed amount of money with which to compensate all persons with an asbestos injury to whom Fibreboard is found to be legally liable. This sum of money must cover all victims, past and future. Under no circumstances may you award any sum designed or

intended to punish or make an example of Fibreboard or the Trust. If you should find that Fibreboard or products manufactured by Fibreboard were a legal cause of injury to plaintiff[s], any payment of damages awarded with respect to Fibreboard's products will be made by the Trust, not by Fibreboard itself. The fact that a trust exists is in no way an indication that you should impose any liability on the Trust. No sum you might award will be paid by either Fibreboard or by insurance; any award will be paid only by the Trust.

h. Any Beneficiary who elects to resolve a claim through the tort system shall provide the Trust (without cost to the Trust) with copies of all pleadings, discovery materials, evaluations, and other similar nonprivileged documentation requested by the Trust in connection with its defense of the claim in the tort system, so that the Trust may efficiently and economically prepare for trial.

E. Funds for Payment of Claims.

As set forth in the Trust Agreement, the Trust shall administer three funds, for payment of Trust Expenses, Class Member Claims and Third Party Claims, to be known as "Fund I," "Fund II," and "Fund III." Fund I is primarily intended to pay expenses of, and claims against, the Trust during the first 25 years after Global Approval Judgment. Fund II is primarily intended to pay expenses of, and claims against, the Trust commencing 26 years after Global Approval Judgment, although it is available to pay expenses and claims commencing 21 years after Global Approval Judgment, if Fund I is insufficient for that purpose. Fund III is primarily intended to pay any expenses and claims not paid from Fund I or Fund II, commencing 46 years after Global Approval Judgment, although

it is available to pay expenses and claims commencing 41 years after Global Approval Judgment if Fund II is exhausted prior to 46 years after Global Approval Judgment.

In order to assure that, to the maximum extent feasible, Trust resources are preserved and fairly allocated among all Beneficiaries (i.e., those who will have claims in the future as well as those who have claims now) Appendix 1 describes in detail how Trust surpluses realized in any Fiscal Year are to be preserved and limits amounts that can be spent in any Fiscal Year to pay claims from Funds I, II or III. In general, Appendix 1 specifies that payments for Trust Expenses, Class Member Claims and Third Party Claims may not exceed annual earnings on the assets within the relevant Fund plus a portion of the remaining principal (calculated by allocating remaining Fund principal equally over the years remaining in the Fund then in use). If any Surplus remains after payment of all Trust Expenses, Class Member Claims and Third Party Claims and certain indemnity expenses for a Fiscal Year (and after restoration of any increases in Principal Amount used in prior years as described below), such Surplus will either increase the Reserve Accunt or build Trust principal. This Reserve Account will be used to pay expenses of claims for any later year before Trustees may access any Increased Principal Amount to be used in that year. If, however, in any of the Fiscal Years 3 through 12 or 16 through 20 after Global Approval Judgment, the Earnings Amount and Principal Amount together with the funds contained in the Reserve Account in excess of $10,000,000 are not sufficient to pay Trust Expenses and to make all payments with respect to Class Member Claims or Third Party Claims for the first two Schedule Categories that are due or all payments with respect to Class Member Claims or Third Party Claims for the third Schedule Category that were due and unpaid on four consecutive prior Distribution Dates, the Trust may increase the

usable portion of the Fund principal by up to 25% for any of Fiscal Years 3 through 12 after Global Approval Judgment or 12.5% for any of the Fiscal Years 16 through 20 after Global Approval Judgment.

1. **Fund I.**

a. **Commencement of Payments.** The Trust shall not pay any Class Member Claim or Third Party Claim (other than Extreme Hardship Claims and Expedited Review Claims) from Fund I until the Distribution Date first occurring after the end of the first Fiscal Year after Global Approval Judgment.

b. **Distributable Amount.** Total payments for Trust Expenses, Class Member Claims and Third Party Claims made from Fund I for any Fiscal Year (i.e., payments for Trust Expenses, Extreme Hardship Claims and Expedited Review Claims made during that Fiscal Year, together with payments for Class Member Claims and Third Party Claims for that Fiscal Year made on the Distribution Date immediately following that Fiscal Year) (other than any payments made from the Reserve Account) shall not exceed the Distributable Amount for that Fiscal Year. For the first Fiscal Year after Global Approval Judgment the Earnings Amount for Fund I shall be calculated from the date of Global Approval Judgment.

c. **Distribution of Remaining Balance.** The transfer from Fund I to Fund II of any remaining balance in Fund I shall occur on the earlier of (i) the day after the Distribution Date for the twenty-fifth Fiscal Year after Global Approval Judgment, or (ii) the day before the Distribution Date for the first Fiscal Year occurring after the twentieth Fiscal Year after Global Approval Judgment in which the maximum possible

Distributable Amount is less than the Earnings Amount and the Principal Amount that were in effect for Fund I for the twentieth Fiscal Year after Global Approval Judgment, the Trust shall transfer such remaining balance and the remaining balance of the Reserve Account to Fund II, at which time payments out of Fund II shall commence as provided in Section E.2.

2. **Fund II.**

a, **Commencement of Payments.** No payments shall be made from Fund II until the Distribution Date for the twenty-first Fiscal Year after Global Approval Judgment. If at that time Fund I still has money left to pay Trust Expenses, Class Member Claims or Third Party Claims, no payments shall be made from Fund II until the earlier of: (1) the day after the Distribution Date for the twenty-fifth Fiscal Year after Global Approval Judgment; or (2) the Fiscal Year in which the Distribution Date referred to in Section E.1.c.(ii) occurs.

b. **Distributable Amount.** The total amount of payments for Trust Expenses, Class Member Claims and Third Party Claims made from Fund II for any Fiscal Year is limited to the Distributable Amount for that Fiscal Year.

c. **Distribution of Remaining Balance.** The transfer from Fund II to Fund III of any remaining balance in Fund II shall occur on (i) the day after the Distribution Date for the twentieth Fiscal Year after the transfer of the balance in Fund I to Fund II pursuant to Section E.1.c., or (ii) such later date as the Trustees determine would be in the best interests of all Beneficiaries, both present and future (but in no event later than the day after the Distribution Date for the forty-fifth Fiscal Year after Global Approval Judgment); at which time payments out of Fund III shall commence as provided in Section E.3.

3. **Fund III.**

a. **Commencement of Payments.** No payments shall be made from Fund III until the Distribution Date for the forty-first Fiscal Year after Global Approval Judgment. If at that time Fund II still has money left to pay Trust Expenses, Class Member Claims or Third Party Claims, no payments shall be made from Fund III until the date Fund II is exhausted or the balance of Fund II has been transferred into Fund III pursuant to Section E.2.c.

b. **Distributable Amount.** The total amount of payments for Trust Expenses, Class Member Claims and Third Party Claims made from Fund III for any Fiscal Year is limited to the Distributable Amount for that Fiscal Year.

c. **Distribution of Remaining Balance.** If there is a remaining balance in Fund III on the day after the Distribution Date for the sixty-first Fiscal Year after Global Approval Judgment, and there are then, or are anticipated by the Trustees to be in the future, any Trust Expenses, Class Member Claims, Third Party Claims and other obligations of the Trust which have not yet been liquidated and/or fully paid, the Trust shall use the remaining balance of Fund III to pay such Trust Expenses, Class Member Claims, Third Party Claims and other obligations of the Trust. Upon the occurrence of the Termination Date, the Trust shall apply any remaining balance of Fund III to such charitable purposes as the Trustees in their reasonable discretion, after consultation with the SCB, shall determine, which charitable purposes, if practicable, shall be related to occupational health.

4. **Determination of Distributable Amount for Each Fund.** Within 90 days following the end of each Fiscal Year after Global Approval Judgment, the Trust shall determine the Distributable Amount for such Fiscal Year, which Distributable Amount (after payment of Trust Expenses, Extreme Hardship Claims and Expedited Review Claims for such Fiscal Year) shall be distributed to pay Class Member Claims and Third Party Claims, in the order set forth in Section F.2, on a date, no later than 120 days following the end of each such Fiscal Year, chosen by the Trust (the "Distribution Date").

F. Order, Timing and Limitations on Payments of Claims.

1. **Eligibility for Payment.** All Class Member Claims and Third Party Claims become eligible to begin receiving payments from the Trust on the Distribution Date immediately following the Fiscal Year in which such Class Member Claims or Third Party Claims are Liquidated, provided that in the case of settled Class Member Claims the Trust has received the release required by Section B.4. Judgments obtained in the tort system shall be eligible for payment in the same order as Claims Liquidated by settlement or arbitration, except as provided in Section F.3.b, and shall be treated as having been Liquidated on the date the claimant obtains a final, nonappealable judgment, except that upon an unsuccessful appeal by the Trust, the date of Liquidation shall be the date of the trial court judgment.

2. **Order of Payment.** On each Distribution Date, the Trust shall make pay-ments on Liquidated Class Member Claims and Third Party Claims in the following order: (1) claims for Mesothelioma and Lung Cancer; (2) claims for Other Cancer and Asbestos Lung Disease I; (3) the first payment on claims for Asbestos Lung Disease II which was due and unpaid

on four or more consecutive prior Distribution Dates, (4) the second payment on claims for Asbestos Lung Disease II which was originally due and unpaid on four or more consecutive prior Distribution Dates; (5) the third payment for claims on Asbestos Lung Disease II which was originally due and unpaid on four or more consecutive prior Distribution Dates; (6) any other payments on claims for Asbestos Lung Disease II; and (7) Residual Claims. While it is anticipated that the Trust will be able to pay all Liquidated Class Member Claims and Third Party Claims on each Distribution Date, all payments due on Liquidated claims for Mesothelioma and Lung Cancer must be made before any payments due on Liquidated claims for Asbestos Lung Disease I and Other Cancer may be made, all payments due on Liquidated claims for Asbestos Lung Disease I and Other Cancer must be made before any payments due on Liquidated claims for Asbestos Lung Disease II may be made, the first payment on Liquidated claims for Asbestos Lung Disease II which was due and unpaid on four or more consecutive prior Distribution Dates must be made before any other payments for other Liquidated claims for Asbestos Lung Disease II may be made, the second payment on Liquidated claims for Asbestos Lung Disease II which was originally due and unpaid on four or more consecutive prior Distribution Dates must be made before any other payments for other Liquidated claims for Asbestos Lung Disease II may be made, the third payment on Liquidated claims for Asbestos Lung Disease II which was originally due and unpaid on four or more consecutive prior Distribution Dates must be made before any other payments for other Liquidated claims for Asbestos Lung Disease II and all other payments due on Liquidated claims for Asbestos Lung Disease II must be made before any payments due on Liquidated Residual Claims may be made. Within each of the seven categories, payments due on Class Member Claims and Third Party Claims shall be made in FIFO order based on

when the Class Member Claims and Third Party Claims were Liquidated, whether by settlement, arbitration or judgment, except that settled Class Member Claims shall be ordered within each such category according to when the release required by Section B.4 is received by the Trust. Other than by virtue of subrogation to a Class Member Claim pursuant to Section H.5.a, no contribution claim brought by a Defendant Class Member shall be paid inasmuch as resolution of a Class Member Claim against the Trust gives rise to a right of set-off or reduction under Section H.1.a of the Trust Distribution Process sufficient to satisfy, and bar the assertion of, any such contribution claim against the Trust.

3. **Terms of Payment.**

a. **Claims Resolved Outside the Tort System.** Class Member Claims resolved without filing an action against the Trust in the tort system and all Third Party Claims shall be eligible for payment over a three-year period, 40% due on the Distribution Date immediately following the Fiscal Year in which such claim was Liquidated and 30% due on each of the next two Distribution Dates, except for Expedited Review Claims paid pursuant to Section B.2 and Extreme Hardship Claims paid pursuant to Section B.8 of this Trust Distribution Process.

b. **Claims Resolved in the Tort System.**

(i) Class Member Claims resolved after the filing of an action against the Trust in the tort system shall be eligible for payment on the following schedule. On the Distribution Date following the Fiscal Year in which such a claim was Liquidated, the Beneficiary shall be eligible to receive the lesser of: (1) 100% of the last settlement offer made by the

Trust before the Beneficiary filed an action against the Trust in the tort system, or 100% of the proposed Award in nonbinding arbitration with the Trust pursuant to Section C, whichever is greater; and (2) 40% of the amount of the judgment or settlement after the action was filed. The remaining balance of the judgment or settlement shall be eligible for payment on the Distribution Dates following the next four Fiscal Years in equal installments so long as each such installment does not exceed $50,000. In the even that each such installment would exceed $50,000, the Beneficiary shall be eligible to receive $50,000 per year until the Class Member Claims is fully paid. In the event that any resulting judgment is less than the proposed Award in nonbinding arbitration with the Trust pursuant to Section C, the Trust shall be entitled to recover as a cost of litigation and deduct from the judgment its cost of mediation and arbitration pursuant to the procedures set forth in Section C.

(ii) Notwithstanding the foregoing, in order to prevent evasion or abuse of the ADR provisions of this Trust Distribution Process, to conserve the assets of the Trust for the benefit of all Beneficiaries, and to manage prudently the cash flow of the Trust in a manner consistent with Section E of this Trust Distribution Process, the Trustees shall have the discretion, in any instance in which the Beneficiaries' judgments against the Trust result from a trial of the claims of more than 15 such Beneficiaries, to pay such judgments in such manner and over such a longer time period (not to exceed 10 years) as the Trustees shall determine is in the best interests of the Trust and of all Beneficiaries.

4. **Deferral of Payments.** All Class Member Claims or Third Party Claims eli-gible for a payment on a Distribution Date which do not receive that payment on that Date because the Distributable Amount for the Fiscal Year has been exhausted

shall have that payment deferred until the following Distribution Date. Any payment obligation so deferred shall retain its position in the FIFO queue as set forth in Section F.2 and shall be accorded priority as set forth in Section F.2. Deferrals may continue from year to year until the Distributable Amount is sufficient to make the payments due on deferred obligations.

5. **Limitation on Payment of Claims.** Aggregate payments on account of Class Member Claims and Third Party Claims arising from any one individual's exposure to asbestos shall not total more than $500,000, whether the Class Member Claim or Third Party Claim is Liquidated through settlement, mediation, arbitration or in the tort system. Any individual with asbestos-related disease shall be deemed to be a separate exposure for purposes of this section.

G. All Claims Resolved Pursuant to the Trust Distribution Process.

In order to conserve the assets of the Trust, all Claimants are enjoined from filing future litigation based on or arising out of a Class Member Claim or Third Party Claim against the Fibreboard, Continental or Pacific Releasees. Any such claim may only be pursued against the Trust as provided in this Trust Distribution Process.

H. Defendant Class Member Procedures.

Pursuant to the Defendant Class Settlement Agreement, and except as otherwise provided herein, (a) Defendant Class Members are releasing Third Party Claims against the Trust, Fibreboard Releasees, Continental Releasees and Pacific Releasees (except that nothing in this Trust Distribution Process or the Defendant Class Settlement

Agreement shall be read as releasing, or be deemed to release, any claims whatsoever Defendant Class Members may have against the Continental Releasees and Pacific Releasees other than those arising out of, or in any way predicated upon obligations created by, the Insurance Policies); (b) Fibreboard Corporation and the Trust are releasing contribution and indemnity claims arising out of Class Member Claims; and (c) the Continental Releasees and Pacific Releasees are releasing any claims (except for reinsurance claims) arising out of Class Member Claims they may have against Defendant Class Members; provided, however, that Defendant Class Members shall have rights against the Trust and the Trust shall succeed to Fibreboard's rights against Defendant Class Members to the extent provided for under this Trust Distribution Process. Without enlarging any substantive rights accorded them by this Trust Distribution Process, Defendant Class Members shall have such procedural rights (relating to procedural issues not expressly dealt with by this Trust Distribution Process) reasonably necessary to pursue or defend rights accorded them by this Trust Distribution Process. Class Member Claims against the Trust to which Defendant Class Members succeed shall be governed by this Section H of the Trust Distribution Process. Settlement Class Members, Fibreboard Corporation, Continental, Pacific and the Trust are bound by the terms of this Section and must abide by the following procedures in connection with suits by Settlement Class Members for asbestos-related injury or disease against Defendant Class Members.

1. **Claims Liquidated Before Judgment Against Defendant Class Members.**

a. **Calculation of Set-Off Amount.** If a Settlement Class Member Liquidates his or her Class Member

Claim against the Trust before judgment is rendered in litigation between the Settlement Class Member and Defendant Class Member(s), the Trust (itself or in Fibreboard Corporation's stead) shall be deemed, in such ongoing litigation, to be (i) a settled defendant within the meaning of the law which governs the judgment entered by the trial court (or any underlying verdict) (the "Judgment Forum Law") and (ii) a legally responsible joint tortfeasor under Judgment Forum Law, without introduction of further proof. Any judgment obtained by a Settlement Class Member against Defendant Class Member(s) shall be reduced or set off to reflect the Settlement Class Member's settlement with the Trust in the manner (whether pro tanto, pro rata, jury allocation or apportionment or otherwise), and in the amount provided for under Judgment Forum Law. Where the dollar amount of the settlement between the Trust and the Settlement Class Member is relevant to the calculation of any such reduction or set off, that dollar amount shall be the total amount agreed to by the Settlement Class Member and the Trust in settlement of the Class Member Claim, including all sums paid and agreed to be paid, without any reduction to present value for claims paid or to be paid within three years of Liquidation. For that portion of any claim not to be paid within three years of Liquidation, the amount of reduction or set off will be calculated at present value as of the end of that three year period. Trust estimates as to the length of time likely to elapse before future payments will be made will be binding on Defendant Class Members and Settlement Class Members alike. Where the judgment against the Defendant Class Member(s) resolves only a portion of the Class Member Claim or potential Class Member Claim that the Class Member has settled with the Trust (for example, personal injury as distinct from wrongful death claims), the dollar amount of the settlement between the Trust and the Settlement Class Member used in calculation of any reduction or set off shall reflect any

apportionment made by the Trust and the Settlement Class Member reasonably and in good faith with regard to rights of the Defendant Class Members under this Trust Distribution Process, provided (i) that Defendant Class Members shall retain any rights available to them under Judgment Forum Law to challenge such apportionment, and (ii) that wherever Judgment Forum Law calls for apportionment of economic and non-economic damages, the value assigned to the Trust's settlement of a Class Member Claim shall be allocated between economic and non-economic damages in the same proportion that the subsequent judgment or underlying verdict against Defendant Class Member(s) allocates such damages, notwithstanding any apportionment set forth in the settlement documents.

b. **Status of the Trust at Trial.** The Settlement Class Member and the Trust shall consent to any procedures required in order to enable the trial court to establish the amount of any judgment reduction or set off in respect of a Trust settlement as if the Trust, itself or in Fibreboard Corporation's stead, had been a party to the litigation prior to settlement. Should a trial court require that the Trust or Fibreboard Corporation be a party in order to establish such amount, no objection shall be made by the Trust or the Settlement Class Member to the filing by Defendant Class Member(s) of a third-party complaint or to the joinder of the Trust, for itself or in Fibreboard Corporation's stead, as a party for this limited purpose only. The Trust, if made a party, shall not be required to enter an appearance, be subject to discovery as a party, or be subject to default or other trial court process or procedure. Under no circumstances shall Fibreboard Corporation or the Insurers be made parties for any purpose.

c. **Discovery and Informational Issues.** The Trust shall comply with the rules of discovery under Judgment

Forum Law concerning requests for product exposure and disease information provided by the Settlement class Member pertaining to such Class Member Claim. In response to a Defendant Class Member request, the Trust and the Settlement Class Member shall promptly verify, no later than the start of jury selection in the trial of an action by the Settlement Class Member against the Defendant Class Member, the fact of the settlement; and in accordance with Judgment Forum Law, also shall provide information regarding the amount and terms of any such settlement of a Class Member Claim. Without waiver by the Trust or Settlement Class Members of their rights to object to discovery of such information, neither product exposure nor disease information provided pursuant to this Subsection H.1.c shall be considered inadmissible at trial based on Rule 408 of the Federal Rules of Evidence or any of its state law counterparts.

2. **Claims Not Liquidated When Verdict or Judgment Obtained Against Defendant Class Members.**

a. **Effect of Verdict or Judgment.** Except as provided in Section H.2.b. and Section H.3, if a Settlement Class Member goes to judgment or verdict against one or more Defendant Class Members without having Liquidated his or her Class Member Claim against the Trust, the Settlement Class Member forever waives and releases that portion of his or her Class Member Claim against the Trust which would have been determined (under principles of Judgment Forum Law unaffected by Global Approval Judgment) by the verdict or judgment had the Trust for itself or in Fibreboard Corporation's stead been a judgment defendant.

b. **Retention of Several Liability Claim.** Notwithstanding any other provision of Section H.2, where

(under principles of Judgment Forum Law unaffected by Global Approval Judgment) the Trust's liability to a Settlement Class Member would be several only, or where the Trust's liability as to a particular category of damages (for example, non-economic damages) would be several only, a Settlement Class Member shall retain that several-only aspect of his or her claim against the Trust, even if the Settlement Class Member goes to judgment or verdict against a Defendant Class Member without having Liquidated his or her Class Member Claim. However, no aspect of the Class Member Claim to which principles of joint or joint and several liability would apply shall be so retained. Should the Trust thereafter settle with the Settlement Class Member based only on the Trust's several liability, the release shall state that Third Party Claims based on joint, or joint and several, liability are not barred by virtue of the several liability settlement and may be pursued in accordance with the provisions of this Trust Distribution Process.

c. **Payment of Verdict or Judgment.** Upon payment of a verdict or judgment returned prior to Liquidation of the underlying Class Member Claim, the Defendant Class Member(s) shall succeed in all respects to that portion of the Class Member Claim against the Trust which would have been determined (under principles of Judgment Forum Law unaffected by Global Approval Judgment) by the judgment in the action against the Defendant Class Member had the Trust for itself or Fibreboard Corporation's stead been a judgment defendant, except to the extent provided in Sections H.2.b and H.5 hereof, and may pursue such Class Member Claim in accordance with this Trust Distribution Process. Notwithstanding any contrary provisions of Judgment Forum Law, a Class Member Claim to which a Defendant Class Member may succeed under this subsection upon payment of a verdict or judgment shall not be lost or extinguished by virtue of

a Defendant Class Member's settlement with a Settlement Class Member reached after a contested trial resulting in verdict, or a verdict or jury or court fact finding as to damages or judgments.

3. **Tort System Claims Against the Trust.**

Should a Settlement Class Member proceed to litigation against the Trust pursuant to Section D of this Trust Distribution Process, no objection shall be made in such tort system cases by the Trust or the Settlement Class Member to the filing by Defendant Class Member(s) of a third-party or cross-complaint against the Trust as successor to Fibreboard Corporation under the Global Approval Judgment. Without in any way waiving or limiting the provisions of this Trust Distribution Process limiting the Trust's liabilities with respect to Class Member Claims and Third Party Claims when a Class Member Claim proceeds to litigation against the Trust in the tort system pursuant to Section D, Defendant Class Members shall retain against the Trust whatever rights of contribution and/or indemnification they otherwise would have had against Fibreboard Corporation under Judgment Forum Law and the Trust shall retain whatever Fibreboard Corporation rights of contribution and/or indemnification it would have had against Defendant Class Members under Judgment Forum Law. In the event that after a verdict or judgment against a Defendant Class Member, the Defendant Class Member upon assertion of its rights is determined to have a valid contribution claim or indemnity claim against Fibreboard or the Trust under Judgment Forum Law, the Settlement Class Member's verdict or judgment against the Defendant Class Member shall be reduced or set off in the amount necessary under Judgment Forum Law to satisfy such Defendant Class Member's claim for contribution or indemnity against Fibreboard or the Trust. Nothing in this Section H.3 or in Section H.2.a shall prevent the Settlement

Class Member from liquidating and collection pursuant to other provisions of Section D of this Trust Distribution Process his or her claim against the Trust based on the verdict or judgment referred to in this Section H.3.

4. **Litigation Between Defendant Class Members and Settlement Class Members.**

In any litigation between Defendant Class Members and Settlement Class Members each shall retain their respective rights under Judgment Forum Law to introduce evidence at trial.

Under no circumstances (other than the commencement by the Trust of formal bankruptcy or insolvency proceedings) shall the Trust (or Fibreboard Corporation) be treated as a bankrupt or insolvent defendant, nor shall the Trust (or Fibreboard Corporation) be considered, for purposes of litigation between Defendant Class Members and Settlement Class Members only, a person who cannot be made a party for lack of personal jurisdiction, or otherwise a party over whom a Settlement Class Member is unable to obtain judgment.

5. **Pursuit of Third Party Claims.**

a. **Defendant Class Member to Stand in Settlement Class Member's Stead.**

In pursuing any Class Member Claim against the Trust to which a Defendant Class Member has succeeded under

subsection H.2.c above, (i) the Defendant Class Member shall stand in the stead of the Settlement Class Member in respect of whose Class Member Claim the Defendant Class Member has succeeded; (ii) such Class Member Claim shall be resolved by Defendant Class Members under this Trust Distribution Process in the same manner as such Class Member Claim would have been resolved had it been asserted by the Settlement Class Member, and (iii) it shall be evaluated on the same basis as if the Settlement Class Member directly presented his or her Class Member Claim to the Trust, without any enhancement, discount or limitation because it is asserted by a Defendant Class Member. Defendant Class Members must present evidence of such Class Member Claims in the same manner as Settlement Class Members; provided, however, that Defendant Class Members are not required to provide information unavailable to them because such information is solely within the control of the Settlement Class Member. In any event, however, Defendant Class Member Claims are to be evaluated by the same standards as Class Member Claims. For the limited purpose of pursuing Class Member Claims, or otherwise in respect of assertion of other rights specifically granted under this Trust Distribution Process, Defendant Class Members shall be treated as beneficiaries of the Trust; provided, however, that under no circumstances shall Section H.6 below apply to Class Member Claims to which Defendant Class Member have succeeded.

b. **Resolution of Claims.** Notwithstanding any other provision of this subsection, Class Member Claims to which Defendant Class Members have succeeded under Section H.2.c hereof or Residual Claims shall be decided by binding arbitration under Section C.2 of this Trust Distribution Process, if not settled previously, and may not exit to the tort system. In such arbitration and in its negotiations with Defendant Class Members, the Trust shall not assert any Fibreboard Corporation

defenses based on the state of the art, or failure to show negligence or product defect (whether based upon design, manufacture or failure to warn), except in those circumstances under which the Trust would also have asserted those defenses against the Settlement Class Member to whose Class Member Claim the Defendant Class Member has succeeded. Moreover, the Trust shall not assert failure to show negligence or product defect as a defense where a Class Member Claim to which the Defendant Class Member has succeeded is brought by a former manufacturer and/or distributor of asbestos-containing high-temperature pipe and block insulation, if the issues of product defect or negligence (as the case may be) covering such pipe and block insulation were fully litigated to an adverse result against that Defendant Class Member at trial of the underlying asbestos-related personal injury action. Under no other circumstances shall the results of such trial be given preclusive effect in any such arbitration. Any arbitration under this subsection shall be confidential, and no statement made, or contention advanced, at such arbitration shall be introduced as evidence or otherwise used against the maker or proponent of such statement or contention in the course of any proceeding other than arbitration under this Trust Distribution Process.

c. **Processing and Payment of Claims.** Class Member Claims to which Defendant Class Members have succeeded shall be included in the FIFO queue established pursuant to this Trust Distribution Process. For purposes of processing, the position of a Class Member Claim to which a Defendant Class Member has succeeded in the FIFO queue shall be determined by the earlier of (a) the date the Settlement Class Member filed with the Trust the underlying Class Member Claim or (b) the date on which the Defendant Class Member paid the Settlement Class Member with respect to the judgment or verdict. For purposes of payment, a Class Member Claim to

which a Defendant Class Member has succeeded will be placed within the appropriate Schedule Category set forth in Section F.2 and, within such category, in FIFO order, based on the date on which the Defendant Class Member paid the Settlement Class Member in respect to the judgment or verdict. Class Member Claims to which Defendant Class Members have succeeded, shall be paid under the terms set forth in Section F.3.a. Prior to receiving payment the Defendant Class Member shall have provided a release as described in Section B.4.

d. **Multiple Claims or Multiple Third Party Claims.** Where Defendant Class Members succeed to a portion of a Class Member Claim by virtue of payment with respect to any verdict or judgment where a Beneficiary retains an interest in the several liability aspect of the same Class Member Claim (regardless of the number of Defendant Class Members who may have succeeded to portions of the Class Member Claim) ("Partial Claims"), Settlement Class Members and Defendant Class Members shall comply with procedures established by the Trust to ensure that all persons with rights under this Trust Distribution Process in respect of the same Class Member Claim coordinate their efforts so that all such Partial Claims can be processed and Liquidated in a single proceeding, designed to resolve all elements of such claims, whether malignancy or non-malignancy, and all causes of action, whether for personal injury, death, loss of consortium, or otherwise against the Trust; provided, however, that nothing in the foregoing shall prevent the Trust, a Settlement Class Member or a Defendant Class Member, as the case may be, from electing to give or take a limited, non-malignancy release under this Trust Distribution Process. In evaluating Partial Claims in the course of such a single proceeding, the Trust shall not differentiate among the aspects of such claims based on whether the right to payment is asserted by a Settlement Class

Member or Defendant Class Member. In those circumstances where different parties (whether Settlement Class Member and Defendant Class Member(s), or more than one Defendant Class Member) assert rights under this Trust Distribution Process in respect of the same Class Member Claim, any disputes regarding such Class Member Claim shall be presented in a single arbitration. Should more than one Defendant Class Member be entitled to payment from a single settlement or award by the Trust, the Defendant Class Members shall share such amount in the same proportion that each made payments to the Settlement Class Member. Notwithstanding the above or any other provision of this Trust Distribution Process, (i) a Settlement Class Member shall not be entitled to take to the tort system a Class Member Claim if any portion of that claim was resolved as to a Defendant Class Member by settlement or in binding arbitration pursuant to Section H.5.b of this Trust Distribution Process; and (ii) Settlement Class Members retain all rights to resolve their Partial Claims with the Trust after the verdict or judgment against the Defendant Class Member and before one or more Defendant Class Member's related Partial Claim(s) is submitted to the Trust in writing for resolution; provided, however, that the Settlement Class Member's resolution of his or her Partial Claim shall not bind any Defendant Class Members or the Trust with respect to any Defendant Class Member's related Partial Claim. The Trust shall settle Partial Claims only in accordance with Section H.5.d-g.

e. If a Settlement Class Member resolves his or her Partial Claim pursuant to Section H.5.d, the Trust or arbitrator will apportion the settlement or award among all elements of the claims that are being resolved (for example, personal injury, wrongful death, loss of consortium, etc.). Until such time as the Partial Claim of a Defendant Class Member has been Liquidated and paid or denied, the related Partial Claim of

a Settlement Class Member Liquidated under Section H.5.d(ii) shall only be entitled to payment of

(i) that portion of the Settlement Class Member's Partial Claim allocated to resolve claims which were not included in the verdict or judgment against the Defendant Class Member, plus

(ii) $500,000 minus the amount in (i), multiplied by the ratio of (x) the several liability portion of the verdict or judgment against the Defendant Class Member to (y) the total underlying verdict or judgment against the Defendant Class Member. Any award of punitive or exemplary damages will be excluded from the verdict or judgment against the Defendant Class Member when calculating (x) or (y).

f. The provisions of Section H.5.e shall not apply if the underlying total verdict or judgment in favor of a Settlement Class Member against one or more Defendant Class Members (excluding any award for punitive or exemplary damages) is $500,000 or less.

g. The provisions of Section H.5.e will cease to apply if the Partial Claim of a Settlement Class Member plus the related Partial Claims of all Defendant Class Members are Liquidated for a total of $500,000 or less.

h. The provisions of Section H.5.e will cease to apply as to any Partial Claim of a Defendant Class Member which is not submitted to the Trust and served on the Settlement Class Member, or his attorney, if any, within three months of the date on which the underlying judgment against the Defendant Class Member becomes final.

6. <u>Cooperation for Court Approvals</u>. Upon liquidation of his or her Class Member Claim, each Beneficiary

shall cooperate with the Trust in seeking any needed trial court approval under Judgment Forum Law of the settlement.

7. **No Modification Without Consent.** Neither the terms of this Section H nor as they apply to Defendant Class Members the provisions of this Trust Distribution Process as to arbitration may be modified without the written concurrence of the Representative Defendant. Other provisions of the Trust Distribution Process may be modified (after prior notice to the Representative Defendant) without the concurrence of the Representative Defendant unless the modification (i) has an adverse effect on Defendant Class Members and (ii) discriminates against them vis-a-vis Settlement Class Members, in which case the modification shall require the written concurrence of the Representative Defendant.

I. Attorneys' Fees.

Attorneys' fees payable in connection with Class Member Claims Liquidated and paid through the Trust Distribution Process, whether as a result of settlement, an arbitration award, or a judgment obtained in the tort system, and whether or not calculated as a percentage of recovery, shall be the lower of the fee provided in the contract between the Beneficiary and counsel and 25%. Costs related to the prosecution of the claim shall be subtracted from the recovery before calculating the attorney's fee. Legal fees shall be paid pro rata from the payments due to the Beneficiaries as such payments are made by the Trust.

J. Amendment.

No amendments or waivers of this Trust Distribution Process will be permitted except as set forth in Section 3.1 of the Trust Agreement.

APPENDIX W

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Civil Action No. 6:93cv_____

New Orleans, Louisiana

GERALD AHERN, JAMES	*	
DENNIS and	*	
CHARLES W. JEEP, On Behalf of	*	
Themselves and Others	*	
Similarly Situated	*	
	*	
Plaintiffs	*	
	*	
v.	*	September 9, 1993
	*	
FIBREBOARD CORPORATION	*	6:00 p.m.
	*	
Defendant	*	
	*	
CONTINENTAL CASUALTY	*	
COMPANY	*	
and	*	
PACIFIC INDEMNITY COMPANY	*	
	*	
Intervenors	*	

EXCERPT FROM THE
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ROBERT M. PARKER
UNITED STATES DISTRICT COURT PRESIDING

Page 10, Lines 1-25

MR. WACHTELL: Your Honor, in order to show cause or the order granting the temporary restraining order and setting the preliminary injunction down for hearing, we have referred to a list of lawyers who have regularly represented asbestos claimants. It is a list to whom we contemplate giving notice as specified in the order, and I want to file that list with the Court.

THE COURT: Very well. Let me inquire of Bill Parker, is it your intention to return to Tyler this evening?

MR. PARKER: Yes, sir.

THE COURT: You are hereby designated a deputy district clerk of the Eastern District of Texas, and I will entrust the original of the papers to you, if you deliver them to Ms. Thompson, then, at 9:00 in the morning.

MR. PARKER: I will do so.

MR. INSELBUCH: If I could just add for the record, the service list of counsel is the service list that the Manville Personal Injury Settlement Trust uses, and it is my understanding that that list includes every lawyer who has filed a claim on behalf of a claimant before that Trust, and as far as

we are all aware it is the most complete list that we could put together.

THE COURT: Thank you, counsel. Gentlemen, let me mention one other thing. You are all aware of the fact that I think our country, more than

APPENDIX X

No. 95-40635
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In re Asbestos Litigation,

Flanagan, et al.
v.
Ahearn, et al.

EXCERPTS FROM THE TRANSCRIPT OF ORAL ARGUMENT ON REMAND, NOVEMBER 12, 1997

Page 46, lines 2-14

JUDGE SMITH:

I'm just curious. Give us an example of what kind of conflict you think there might ever be in a limited funds case, assuming this is a limited funds case.

MR. INSELBUCH:

I can't think of one offhand. But it can't depend upon why they are there in a limited fund context. It has to have to do with something else. Manville would give you the example. Manville, the Second Circuit's first opinion, they said if there's an enforceable right [there would be a conflict among members of the limited fund class].

Page 56, lines 8-25; page 57, lines 1-20

MR. WACHTELL:

***

Let me briefly turn to the issue of commonality and typicality. I was quoted as saying that the class could not have brought a lawsuit here. I don't believe that's accurate. In fact, I'm looking at the transcript of the Rudd arguments. This is the next day on Rudd. Quote, I think it would be reasonably clear and quite clear that the members of the class would be able to maintain their own declaratory judgment action and would have standing to do so against the insurance companies. What I may well have said in Ahearn is that I do not think that members of the class would have brought individual damage actions by way of class and litigated them.

And that is indeed our position, that you could not have litigated individual damage claims. But as this court determined and as the district court determined, the settlement does not litigate individual damage claims and why [sic] the settlement cannot supply the requisites of commonality and typicality. And that is the teaching of the Supreme Court in Amchem. The settlement can remove issues, for example, the individual adjudication of damages that would exist in a litigation context but do not exist in the settlement context by virtue of the settlement. And that is precisely what this court quite accurately pointed out in its prior opinion, that this settlement was not litigating the individual claims, that it was providing for a fund where everybody had a common interest and a typical interest and for an equitable determination.

(4) (5)

Nos. 97-1695, 97-1704

Supreme Court, U.S.
FILED
MAY 18 1998
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ESTEBAN ORTIZ, *et al.*,

Petitioners,

—v.—

FIBREBOARD CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS CONTINENTAL CASUALTY COMPANY, CNA CASUALTY COMPANY OF CALIFORNIA, COLUMBIA CASUALTY COMPANY AND PACIFIC INDEMNITY COMPANY

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40 pp

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding with the following exceptions. William James Mitchell is a plaintiff class representative not listed in the petition; and James and Juanita Drake are not class representatives (and, to respondents' knowledge, are not parties).

The following are parents of respondents Continental Casualty Company, CNA Casualty Company of California and Columbia Casualty Company: CNA Financial Corporation; Loews Corporation. The following are non-wholly-owned subsidiaries of respondent Continental Casualty Company: Convida Holdings, Ltd.; Convida Compania de Seguros de Vida S.A.; Agency Management Services, Inc.

The following are parents of respondent Pacific Indemnity Company: The Chubb Corporation; Federal Insurance Company. There are no non-wholly-owned subsidiaries of respondent Pacific Indemnity Company.

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STATEMENT OF THE CASE

In an attempt to deflect attention from the true nature of this petition — a scattershot array of factbound objections to a *sui generis* case — petitioners have presented the class action settlement in this case (known as the "Global Settlement") and the Fifth Circuit decisions approving it in a totally misleading fashion. They portray the Global Settlement as a carbon copy of the settlement invalidated by this Court in *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997), where the district court had approved a class settlement solely on the basis of projected increased efficiency over individual adjudications in the tort system. But as both lower courts expressly found — in findings petitioners wholly ignore — the basis of the Global Settlement here is decidedly different: a unitary class settlement was necessary in this case *in order to secure the class's only possible source of meaningful recovery*. App. 73a-74a, 231a-232a, 241a.

As the Fifth Circuit put it, the Global Settlement was "undisputedly driven" by a mammoth coverage dispute between Fibreboard Corporation and its two insurers (App. 75a) — a coverage dispute that receives scant mention in the petition's description of the case. On August 27, 1993, when the Global Settlement was reached in principle, the parties were confronted with the following circumstances. The class, comprised of over 100,000 future asbestos claimants, had potentially well over $1 billion in claims against Fibreboard. Fibreboard, however, also faced more than $1 billion in *current* settlement obligations, and had non-insurance assets sufficient to pay no more than a small fraction of that amount. App. 42a, 277a. Instead, the source of *any* meaningful recovery for class members lay in two insurance policies that Fibreboard had purchased from respondents Continental and Pacific. Although Fibreboard claimed that these policies provided it with no-aggregate-limit coverage, the two insurers were disputing coverage in a California litigation that, as both lower courts found, Fibreboard had a "significant risk" of losing outright. App. 52a, 75a-77a, 357a. The morning of the agreement in principle, the California Court of Appeal had heard the final argument in that litigation and announced its intention to rule expeditiously.

For class members, then, a settlement of the coverage dispute was the *only* possible alternative to catastrophic risk: a Fibre-

board loss in the coverage litigation would render their claims against Fibreboard, no matter how meritorious, virtually worthless, for Fibreboard would then be left "insolvent simply on the basis of claims already settled." App. 75a, 357a-358a. But as detailed below, a settlement of the coverage dispute was possible only as part of a unitary resolution involving the class. The District Court found (and the Fifth Circuit confirmed) that "[r]esolution of the insurance dispute required a unitary settlement in a proceeding in which all claims were compromised." App. 232a, 241a, 374a-375a, 75a-77a; *see* pp. 5-7, *infra*.

There is thus no basis whatever for petitioners' overblown cries that the Fifth Circuit's approval of the Global Settlement here was "insubordination" and an "astonishing refusal to apply the rules of law laid down by this Court" in *Amchem* (Pet. 15, 30) — much less any basis for their insistence that this Court must assume the factbound role of correcting an alleged misapplication of *Amchem* less than 12 months after that case was decided and despite the lack of any conflict among the lower courts as to its meaning. To the contrary, this case presents *precisely* what this Court found lacking in *Amchem*: a compelling reason, "commonly held" by all class members, why a class settlement was necessary. App. 57a-58a & n.8. All class members shared the "real and enormous" risk of "the catastrophic results of a loss by Fibreboard in the coverage case," and, consequently, an overriding common stake in an action and a settlement that would fairly resolve that risk. App. 76a, 69a, 58a & nn.7-8. By the same token, "[n]one of the uncommon questions, abounding in *Amchem*, exist in th[is] case": contrary to petitioners' repeated insinuations, the Global Settlement — while resolving the commonly held issues "regarding insurance coverage for the class' injuries and establishment of an equitable distribution process to insure that all class members receive compensation" where there may not be enough money to go around — did *not* liquidate the recoveries of individual class members. App. 3a, 57a-58a & n.8, 85a.

Review is similarly not warranted of petitioners' subsidiary complaints about the non-opt-out nature of this class. In particular, this case does not present the question raised in *Adams*

v. Robertson, 117 S. Ct. 1028 (1997), whether opt-out rights may be denied as to claims for money damages simply because a proposed settlement would provide equitable remedies that would be more efficient than individual suits for damages. To the contrary the plain language of Rule 23(b)(l)(B) and hundreds of years of precedent make clear that a non-opt-out class is called for in cases involving monetary claims where, as here, a unitary resolution is necessary to protect the class. *See* pp. 18-27, *infra*. Petitioners' hodgepodge of objections to the Fifth Circuit's application of this settled law (objections for which they cite virtually no authority at all, much less a valid conflict) present no reason for this Court's review.

Instead, this case presents unique circumstances in which class members needed a unitary resolution in order to resolve a common overwhelming risk; in which no one disputes that the plain language of Rule 23(b)(1)(B) authorized a non-opt-out class; in which an indisputably fair unitary resolution was reached and was approved, after exhaustive inquiries, by the courts below; and in which the appropriateness of such a resolution was established by centuries of jurisprudence. As petitioners' own counsel has previously acknowledged — in a statement completely contrary to the petition's extravagant claim that the Fifth Circuit has "issued an invitation to mass tort defendants nationwide" to flock to "the courts of that circuit" (Pet. 2) — the decision below does not "offer significant precedent for future . . . class actions" because "Fibreboard presented such a unique fact pattern that I do not believe it will ever arise again. [The panel's decision is] only precedent for a class action in the event there is a dispute between an insurance company and an insured where the insured would go insolvent otherwise. That won't occur very often." *Business Insurance*, August 5, 1996, at 38.

I. Background and Procedural History

The Global Settlement, reached on the very eve of the potentially final appellate argument in the coverage litigation after extended, hard-fought negotiations, resolves the risks that litigation posed to the class, to Fibreboard and to the insurers. It does so on financial terms that not even petitioners claim are unfair to the class: payment of over $1.5 billion to be placed in

an asset-conserving, independent Trust for the benefit of "future" claimants in return for their releasing Fibreboard and the insurers from personal injury asbestos claims. App. 49a-50a. And it accomplishes this in a manner that maximizes the amount of money class members will actually receive, by capping claimants' attorney's fees at 25% (well below the 33-40% norm) and by dramatically reducing the costs of defense. App. 362a-366a. Equally important, however, is what the Global Settlement does *not* do: it does *not* liquidate a single personal-injury tort claim for money damages, and it does *not* deprive class members of their right to control their individual claims. App. 58a & nn.7-8, 85a. Instead, those claims will be liquidated on an individual basis as they arise. App. 50a, 346a.

So the District Court found in comprehensive findings of fact, conclusions of law and an extensive opinion issued after an eight-day live fairness hearing featuring testimony by 18 witnesses, hundreds of exhibits and full procedural rights afforded to petitioners — a hearing which itself followed broad discovery by petitioners and an unprecedented $18 million worldwide notice campaign. The District Court found, as noted above, that the risks posed to all parties by the coverage dispute could be resolved "only" through a unitary settlement encompassing all claims, and that "[t]he need to protect Class members' common interests in the insurance proceeds subject to the coverage dispute demand[ed] a unitary resolution permitting equitable distribution." App. 241a, 231a-232a. It went on to find that the Global Settlement is fair to the class, and — given the risks posed by the coverage dispute — indeed represents a "far" superior outcome for the class than any practical alternative. App. 241a-242a, 366a-367a.

The Fifth Circuit affirmed these findings, conclusions and opinion, with one judge dissenting. In an extensive opinion, the court considered and rejected at length each one of the myriad of objections petitioners had raised, including their claim that the District Court's judgment was at odds with the Third Circuit's decision in *Amchem* (then named *Georgine*). Recounting in detail the "stark contrast" between this case and *Amchem*, the Fifth Circuit — correctly anticipating this Court's *Amchem* holding — held that the class here was valid despite its "like[ly] agreement" that the *Amchem* class was not. App. 57a-58a & n.8.

This Court subsequently remanded this case to the Fifth Circuit for further consideration in light of *Amchem*. The Fifth Circuit ordered briefing on the issue, and heard full oral argument. It then reaffirmed its conclusion regarding the "controlling differences between this case and *Amchem*," with one judge dissenting. App. 2a. Respondents respectfully refer this Court to the District Court's findings and to the Fifth Circuit majority opinions for a full description of the Global Settlement and the circumstances and negotiations that led to it.

II. The Uncontested Record

Petitioners, however, completely ignore the findings of the courts below. They proceed as if the class somehow had no need to participate in a settlement here; as if the coverage dispute were an irrelevant sideshow; and as if the Global Settlement actually liquidated the individual recoveries of hundreds of thousands of individual tort claimants in the name of "tort reform by judicial fiat." Pet. 2. In short, they pretend that this case is *Amchem* itself. This self-serving presentation — which is obviously intended to obscure the fact that, under petitioners' version of the law, there was simply *no way* for the class to protect itself against the risk of the coverage dispute — was roundly rejected by both courts below in findings that petitioners pretend do not exist, but nowhere seriously dispute.

A. The Risk Posed To The Class By The Coverage Dispute Required A Unitary Resolution.

For all their rhetoric, petitioners never take issue with the findings of the courts below that "[r]esolution of the insurance dispute required a unitary settlement in a proceeding in which all claims were compromised." App. 232a, 241a, 75a-76a. Indeed, Fibreboard and one insurer had earlier tried to settle the coverage dispute *without* the participation of the plaintiffs, and had failed. App. 314a. As the lower courts determined, the unique circumstances of this coverage dispute — involving a claim of no-aggregate-limit, billion-dollar-plus coverage on which the insured's corporate survival was entirely dependent — did not permit a piecemeal settlement. App. 231a-232a, 241a.

To the contrary, from *Fibreboard's* perspective, its coverage claims were the only thing that stood between it and insolvency: it believed it could remain a viable company, solve its asbestos problem and preserve its net worth if it prevailed in the coverage litigation; it would be immediately bankrupt if it lost. App. 357a-358a. Accordingly, it was not about to settle that litigation on terms that would still leave it facing inevitable bankruptcy. Unless it were to receive from the insurers a sum of money sufficient to ensure that it would be in a position to pay all asbestos claims and all costs of defense in an ongoing litigation regime, it was not willing to leave itself naked of insurance and yet exposed to further claims by asbestos plaintiffs. App. 309a, 374a-375a. Thus, from Fibreboard's standpoint, any settlement of that dispute either had to (1) be so financially cushioned that there was no real risk that future asbestos liabilities and defense costs would place its corporate existence in jeopardy; or (2) involve the asbestos plaintiffs.

The *insurers*, for their part, were certainly willing to put enormous funds on the table to rid themselves of the potential open-ended, no-limit exposure claimed by Fibreboard. But they were not willing to forgo their substantial arguments disputing coverage — on which, as the District Court and Fifth Circuit found, they had a significant chance of escaping any liability at all (App. 52a, 75a-76a, 357a) — by giving Fibreboard the "cushion" necessary to place its survival beyond question in the face of continuing asbestos claims and defense costs. App. 330a. Nor were they willing to pay the enormous sums entailed by a settlement without ensuring that they had ended their exposure once and for all. The Fifth Circuit fully compiled the reasons why the insurers could not afford to remain exposed to opt-outs, not the least of which was that the timing of the coverage appeal would have entailed giving class members the right to opt-out *after* the outcome of the appeal was known, and hence a one-way option on the coverage litigation. App. 43a-44a, 306a-307a, 374a. Thus, from the insurers' standpoint, any settlement of the coverage dispute involving sums acceptable to Fibreboard had to involve all the asbestos plaintiffs.

The situation facing the *class* was thus simple. The insurers and Fibreboard could not come to terms on a settlement of the

coverage dispute without involving the asbestos plaintiffs. For that very reason, however, the class had enormous negotiating leverage over both the insurers and Fibreboard, each of which faced catastrophic risk if the coverage dispute continued. Those parties were consequently offering the class a tremendous amount of money as part of a global settlement of their claims — an amount that, while not guaranteeing all class members a 100% recovery, was indisputably a fair resolution of their claims. App. 98a, 359a-361a. The class could either secure that enormous fund for itself, or run the significant risk of losing the insurance entirely by pressing forward with a quixotic pursuit of what remained of Fibreboard's non-insurance assets.

In light of this, petitioners' portrayal of the Global Settlement as an unnecessary expedient designed to let big business off the hook is grossly inaccurate. When the actual nature of the circumstances that gave rise to the Global Settlement are considered, the true import of petitioners' arguments becomes clear: as they would have it, class members — as a matter of their *own* due process rights, no less — had no alternative but to continue to suffer the risks of the coverage litigation.

B. The Fundamental Differences Between This Case And *Amchem*.

This overriding common stake of class members in a unitary resolution renders this case fundamentally different from *Amchem*. As the Fifth Circuit determined, petitioners' portrayal of this case as a carbon copy of *Amchem* is simply unfounded.

1. *Amchem* involved a settlement resolving the claims of "hundreds of thousands, perhaps millions of individuals" having in common nothing beyond "past exposure to asbestos products manufactured by one or more of 20 companies." *Amchem*, 117 S. Ct. at 2237. No reason was offered why these persons had any need for a class resolution of their claims: in particular, no contention was made that class members would lack an adequate source of recovery if permitted to continue to proceed with individual actions. *See id.* at 2249 n.19. Instead, certification was sought under Rule 23(b)(3) not on the basis of class members' needs, but rather (as in Rule 23(b)(3) class

actions generally) simply upon claims of increased "systemic efficiency" over individual adjudications. *Id.* at 2246.

This notwithstanding, the settlement did "'more than simply provide a general recovery fund'" for class members' benefit; it instead made "essential allocation decisions designed to confine compensation and to limit the defendants' liability," decisions that "necessarily favor[ed] some claimants over others." *Id.* at 2243, 2251. For example, the *Amchem* settlement apportioned "individual damages" by specifying a narrow range of damages payable for each disease type. App. 58a & n.8; *see* 117 S. Ct. at 2240. It prohibited inflation adjustment of these ranges, and imposed "case flow maximums" capping the number of claims payable for each disease in a given year. 117 S. Ct. at 2240. And it extinguished without any compensation at all a wide variety of claims, even if they were otherwise recognized under applicable state law. *Id.*

Finally, "[c]lass members, in the main, [were] bound by th[is] settlement in perpetuity, while [the] defendants [could] choose to withdraw from the settlement after ten years." *Id.* at 2241. A "back-end" opt-out right, whereby a class member could exit the settlement and sue in the tort system upon the subsequent manifestation of injury, was limited to a "small number of class members — only a few per year." *Id.* Perhaps unsurprisingly, this settlement came under sharp attack by numerous objectors as financially unfair to the class. *Id.*

The *Amchem* settlement, in sum, took a class of persons with virtually no common interests and no common need for a class resolution, and imposed upon them a class-wide resolution of a host of matters on which their interests sharply diverged.

2. The Global Settlement in this case is different on every level. App. 2a-3a, 57a-58a & nn.7-8. Class members here shared — not simply past exposure to asbestos products — but also the "real and enormous" risk arising from the coverage dispute. App. 76a. *All* class members "faced the real possibility" that an adverse decision in that dispute would leave them no source of recovery whatever. App. 75a. *All* class members thus shared an "identical" need for a class resolution "to avoid the

risks of insurance coverage litigation and to insure that money remains available to pay their claims." App. 3a, 57a-58a.

As the Fifth Circuit found, the class resolution in this case was thus "undisputedly driven" — not, as in *Amchem*, by a search for alternatives to the tort system — but by this common and overriding need of the class. App. 75a, 57a-58a. Class certification was accordingly predicated not on Rule 23(b)(3), but on the very different provisions of Rule 23(b)(1)(B), which provides for class treatment where class members' pursuit of individual actions would create a risk of prejudice to other class members' claims. App. 2a, 72a-85a.

Moreover, as the Fifth Circuit put it, while the Global Settlement resolves the risk to class members by providing an enormous and unquestionably fair amount of "money and an equitable distribution process," it does *not* "award damages to individual victims" or "make any determination" of the "amount" of money to which they are entitled. App. 57a-58a, 85a, 50a. Unlike in *Amchem*, it sets *no* ranges of recoveries for particular diseases and makes "no allocation or difference in award according to nature or severity of injury"; individual recoveries will instead be "subsequently" liquidated on an "individual" basis as they arise through *non*-binding negotiations, mediation or arbitration with an independent Trust, which will consider all historically relevant individual factors and circumstances. App. 2a, 49a-50a, 57a-58a & n.7, 337a, 346a. And if individual claimants are dissatisfied with their proposed recovery for any reason, they have an absolute "back-end" right to litigate their claims in court, with the Trust substituting for Fibreboard as the defendant. App. 50a, 58a n.7, 346a; *see* pp. 12-13, *infra*. *No* objector, petitioners included, challenged this settlement as financially unfair.

As the Fifth Circuit put it, the Global Settlement, in marked contrast to *Amchem*: involved a class sharing an overriding common interest "regarding insurance coverage for the class's injuries and establishment of an equitable distribution process to insure that all class members receive compensation"; resolved *only* those "commonly held questions"; and did *not* resolve the matters — what each class member will actually

recover — as to which class members' interests may differ. App. 57a-58a & n.8; *see also* App. 2a-3a.

C. The Trilateral Agreement Is Markedly Inferior To The Global Settlement.

These findings of the courts below notwithstanding, the coverage dispute goes practically unmentioned in the petition. Indeed, petitioners' primary reference to it is a brief allusion to its having been supposedly "mooted" by the "Trilateral Agreement" between Fibreboard and the insurers. Pet. 2-3 n.2. They assert that the Trilateral Agreement "provides that, if the Global Settlement is *not* approved, the insurers will pay Fibreboard $2 billion — half a billion *more* than the insurers' payment to the trust under the Global Settlement" and that it "guarantees that Fibreboard will have ample insurance coverage with which to pay future asbestos claims." Pet. 4.

These assertions range from the materially incomplete to the flatly untrue. Under the Trilateral Agreement, Fibreboard would indeed receive $2 billion from the insurers if the Global Settlement were not approved — but it would have to use that money to pay a host of claims and other liabilities *in addition* to those advanced by class members, including unsettled asbestos claims of "present" claimants not within the class and the enormous defense expenditures entailed by resolving claims in litigation. App. 361a-362a, 354a-355a. As a result, the record and findings below are uncontroverted that — contrary to the statements in the petition — the Trilateral Agreement is "far" inferior to the Global Settlement from the point of view of the class and does *not* provide enough money to guarantee payment, full or partial, to class members. App. 73a, 358a-359a, 361a-366a. The record is uncontested that the class would in the aggregate receive at least several hundred million dollars *less* under the Trilateral Agreement than under the Global Settlement, and a significant number of class members might well receive *nothing* at all. App. 358a-359a, 361a-362a.*

* The expert testimony at the fairness hearing laid this out in detail. That testimony was that the class would receive $234-477 million *less* under the Trilateral Agreement than under the Global Settlement, even taking Fibreboard's equity into account. App. 327a-328a; JA7:2054-56, 2768-70; JA125. As a consequence — whereas under the Global Settlement it was more probable than not that *all* future claimants would receive fair and appropriate compensation (App. 359a) — under the Trilateral Agreement 41-50% of the class, between 104,000 and 127,000 asbestos claimants, would likely be left unpaid. JA117; JA118.

Indeed, as the Fifth Circuit summarized the record, under the Trilateral Agreement, "Fibreboard would be unable to pay all the valid claims against it within five to nine years." App. 73a.

The reason for this lies in the origins of the Trilateral Agreement, which is likewise omitted from the petition. The Trilateral Agreement grew out of a last-minute demand by class counsel that, as a condition to the class's entry into the Global Settlement, Fibreboard also as a "back up" settle the insurance dispute directly with the insurers so that — even if the Global Settlement were not approved — the coverage dispute would not proceed. App. 329a-330a. The insurers, however, insisted that such a "back up" agreement cost them no more than $2 billion, notwithstanding Fibreboard's insistence that it needed hundreds of millions of dollars more to pay for the other liabilities described above and the defense costs it would incur in the tort system. App. 329a-330a. The record is clear that Fibreboard yielded only as the price for obtaining agreement to the Global Settlement. App. 314a. It is thus perverse for petitioners to stand the settlement on its head by maintaining that this contingent, inferior "back up" agreement nullifies the class's need for the "far" superior Global Settlement. App. 366a.

D. Bankruptcy Was Not An Available Option.

Although petitioners suggest that bankruptcy would have provided an alternative to a unitary class resolution — and criticize the Fifth Circuit for having "an avowed purpose of circumventing the Bankruptcy Code" (Pet. 11, 21) — they do not quarrel with one central fact: class members could not have put Fibreboard into bankruptcy in August 1993. App. 78a, 376a. Bankruptcy proceedings could have been reached only by forcing Fibreboard to litigate for and *lose* its claimed insurance, the only source of real recovery for the class. App. 76a-79a. Petitioners' suggestion, then, is that the class was required — *required* — to spurn a $1.535 billion settlement and force Fibre-

board to roll the dice in the coverage litigation: secure in the knowledge that, though coverage might be lost, a bankruptcy proceeding in which class members would receive at most pennies on the dollar would be waiting to "protect" them.

E. The Petition Completely Misrepresents The District Court's Role.

The dramatic license petitioners have taken with the facts of this case is no more evident than in their constant refrains that the District Court "choreographed," "orchestrated" and "coached" the Global Settlement. Pet. 2-3, 26. As the Fifth Circuit found in rejecting petitioners' similar insinuations below, "Judge Parker's role in the negotiating process was insubstantial." App. 89a; *see* App. 46a. The Fifth Circuit's description of the origins of this case is likewise categorically at odds with petitioners' charge that the District Court injected itself into the parties' dispute "before a lawsuit was even filed." Pet. 3. As the Fifth Circuit related, before taking a single action with respect to the negotiations that led to the Global Settlement, the District Court had before it a case: (a) asserting the rights of tens of thousands of asbestos claimants to the proceeds of Fibreboard's claimed insurance; (b) whose filing was concededly intended by Fibreboard and the claimants to pressure the defendant Continental into seeking an overall resolution of the coverage dispute; and (c) where Continental had informed the court that it would be willing to settle only as part of such an overall resolution. App. 42a-43a. And even then, the District Court did not itself participate in negotiations, but rather appointed a separate mediator (Judge Patrick Higginbotham of the Fifth Circuit) to assist the parties. *Id.*

F. The Global Settlement Is Financially Fair.

Finally, despite their vitriol about the alleged sacrifice of the class's rights, petitioners do *not* assert that the Global Settlement is financially unfair to the class. Nor could they. The settlement transforms disputed insurance coverage into over $1.5 billion cash for distribution to class members in accordance with procedures that ensure that the proceeds will not be dissipated on Fibreboard's costs of defense or plaintiffs' transaction costs (including contingency fees).

These overwhelming benefits, as the District Court and Fifth Circuit found, far outweigh the few minor ways in which the settlement might affect the amount of damages some claimants might receive for their claims. App. 372a-374a, 85a. Indeed, these effects are caused principally by provisions designed to *protect* the interests of class members — by avoiding inequitable dissipation of the trust funds through disproportionate windfall awards, *e.g.*, punitive damages against the *Trust* — and should have only minimal impact on class members' individual recoveries.* Moreover, this was a *settlement* in which each of the parties had to make concessions to achieve a resolution that avoided the very major litigation risks that otherwise confronted *each* of them. The important questions are thus whether the $1.535 billion the class was able to extract is fair and reasonable in light of the risks posed by the coverage dispute, and whether receipt of that fund and resolution of those risks warrants the limitations discussed above. Petitioners do not contest the lower courts' affirmative findings on either point.

REASONS FOR DENYING THE WRIT

I. PETITIONERS' ALLEGATIONS THAT THE FIFTH CIRCUIT "DEFIE[D]" *AMCHEM* ARE BASELESS.

Petitioners' primary contention is that this Court — less than one year after deciding *Amchem*, and in the absence even of any allegation of conflict or confusion in the lower courts as to its meaning — should take the extraordinary step of reviewing the factbound question whether the Fifth Circuit correctly applied that decision on the facts of this case. Petitioners base

* While petitioners complain about several of the "limitations" imposed by the Global Settlement (such as the $500,000 cap on damages, Pet. 6), the District Court found on the uncontroverted record that these provisions reflect tort-system realities in suits against Fibreboard. For example, the District Court specifically found that only a handful of the over 100,000 plaintiffs to have sued Fibreboard before the Global Settlement was reached had ever recovered more than $500,000 in damages against it and that the insurance policies at issue in the coverage dispute specified a $500,000 per-person limit. App. 373a. The District Court made similar express findings regarding the minimal effect of the other alleged limitations on recovery. App. 372a-374a.

this contention on wild and reckless charges of supposed "astonishing" "insubordination" by the Fifth Circuit.* These charges are baseless and do not warrant this Court's review.

1. To begin with, this Court's opinion in *Amchem* did not, as petitioners assert, "*already* reject[ ] the Fifth Circuit's application of Rule 23(a) to this settlement class action." Pet. 11 (emphasis in original). One searches *Amchem* in vain for petitioners' claimed directive that this very different class settlement must necessarily be disapproved. To the contrary:

- *Amchem* distinguished this case by name as involving a less "sprawling" settlement class, 117 S. Ct. at 2250;
- *Amchem* went on repeatedly to emphasize that it did *not* involve a Rule 23(b)(1)(B) class settlement, that its ruling was rooted in large part in peculiar concerns arising out of class certification under the very different provisions of Rule 23(b)*(3)*, and that the governing requirements would be different in cases under Rule 23(b)(1)(B). *See id.* at 2245-47, 2249 n.19.
- *Amchem* then observed that its primary ground for decision — lack of "predominance" of common issues — does *not* apply to cases "under Rule 23(b)(1)(B)." *Id.* at 2249 & n.19. And it also indicated that the intraclass conflict in that case existed precisely because the settlement purported to make "essential allocation decisions" regarding individual claimants' compensation even though it was "not a 'limited fund' case certified under Rule 23(b)(1)(B)." *Id.* at 2251.

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* Seeking to divert attention from the lack of any conflict among the lower courts as to *Amchem*'s meaning, petitioners also contend that this Court should nonetheless grant review because "this case enshrines the Fifth Circuit as venue of choice for mass tort defendants" and "other courts of appeals" will supposedly not "have an opportunity to rule" on this issue. Pet. 30. The empirical basis for this dire prediction is unclear at best. Petitioners have incanted this augury ever since this case was filed in 1993, yet are unable to cite a single similar class action settlement in any court of the Fifth Circuit in the intervening five years.

In short, *Amchem* — far from "expressly repudiat[ing]" and "reject[ing] the Fifth Circuit's" decision (Pet. 11-12) — left undisturbed that Circuit's previous conclusion that this case meets the requirements of subdivision (b)(1)(B) of Rule 23, and then distinguished Rule 23(b)(1)(B) cases from each of this Court's grounds for rejecting the *Amchem* settlement.

Indeed, petitioners suggest that the Fifth Circuit defied a direct command of this Court in *Amchem* only by unfairly tinkering with a quote from the Circuit's first (*pre-Amchem*) opinion. They attribute to the Fifth Circuit the statement that "in the settlement class context, common issues arise from the settlement itself," and present the Fifth Circuit as therefore having held that "settlement obviates or reduces the need" for scrutiny of class certification. Pet. 11-12. They then proclaim that *Amchem* rejected this supposed "holding" of the Fifth Circuit.

Inspection reveals, however, that the phrase attributed to the Fifth Circuit appears only as a parenthetical description of the view of the Newberg treatise, *not* as the Fifth Circuit's holding. App. 56a. What the Fifth Circuit did hold was that courts must "consider the settlement" and "look at the terms of a settlement" in assessing certification of a settlement class (App. 54a-56a): not, as petitioners allege, in order to pretermit the certification inquiry, but to *assist* that inquiry by allowing consideration of "important and relevant information" that "will often expose diverging interests or common issues" not otherwise evident. App. 54a-55a.* This *actual* holding is squarely in accord with *Amchem*'s recognition that a "settlement *is* relevant to a class certification," "*is* a factor in the calculus" and *cannot* be "ignore[d]" in the certification inquiry — as well as with the thorough consideration of the settlement undertaken in *Amchem* itself. 117 S. Ct. at 2248-49, 2251 (emphasis added).

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* Indeed, this holding that settlement may "expose diverging interests" — and thus may count *against* certification — belies petitioners' charge that the Fifth Circuit held that the existence of a settlement "obviates or reduces" the certification inquiry. Petitioners' charge is also at odds with the Fifth Circuit's statement that it "likely agree[d]" with the Third Circuit that — the existence of a settlement notwithstanding — the *Amchem* class (which was not yet before this Court) could not be certified because of "typicality and commonality problems." App. 58a n.8.

2. Similarly, petitioners' cries of "insubordination" find no support in the fact that the Fifth Circuit reaffirmed its prior judgment after this Court remanded this case "for further consideration in light of *Amchem*." App. 36a. Beginning with its impertinent first sentence, the petition depicts a GVR order as really being a directive for reversal rather than (as the order states) "for further consideration," and implies that certiorari is to be granted as a matter of course if a court of appeals determines upon "further consideration" that its original judgment is not affected by this Court's intervening decision. Pet. 1-2. That is simply not the case: indeed, in the past two years alone, this Court has denied certiorari at least 7 times where a court of appeals reaffirmed its original judgment after a GVR.*

Nor do petitioners' sneers about the length of the Fifth Circuit's opinion on remand — as if brevity were somehow a reversible vice — aid their cause. As noted above, the Fifth Circuit in its prior opinion had *already* detailed the distinctions between this case and *Amchem* and noted its "likely *agree-[ment]*" with the Third Circuit's disapproval of the *Amchem* settlement. *See* pp. 4-5, 7-10, *supra*. Indeed, the Fifth Circuit had there indicated its view that the *Amchem* class did not satisfy Rule 23 for the precise reason ultimately adopted by this Court: because that action — unlike this one — did nothing beyond "requesting individual damages for members of a global class of asbestos claimants" despite "the huge number of individuals and their varying medical expenses, smoking histories, and family situations." App. 57a-58a & nn.7-8; *compare Amchem*, 117 S. Ct. at 2250. It hardly amounts to "insubordination" for the Fifth Circuit (after full briefing and argument) to have restated this conclusion, in which it had correctly anticipated this Court's *Amchem* ruling, by cross-referencing the findings "detailed in [its] prior opinion" (App. 2a-3a) rather than by recapitulating them in full.

* *Anheuser-Busch v. Schmoke*, 101 F.3d 325 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997); *United States v. Meza*, 127 F.3d 545 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 1103 (1998); *Motorcity v. Southeast Bank*, 120 F.3d 1140 (11th Cir. 1997), *cert. denied*, 66 U.S.L.W. 3704 (1998); *United States v. Knapp*, 120 F.3d 928 (9th Cir.), *cert. denied*, 118 S. Ct. 417 (1997); *Martin v. Telectronics*, 105 F.3d 1090 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 850 (1998); *McLeod v. Oregon*, 102 F.3d 376 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1823 (1997); *Feltrop v. Bowersox*, 91 F.3d 1178 (8th Cir.), *cert. denied*, 117 S. Ct. 1849 (1997).

3. Once the petition is stripped of these baseless assertions of "insubordination," it loses even any pretense of presenting a certworthy issue. Petitioners' remaining assertions that insufficient common issues and an intraclass conflict existed on the particular facts of this case raise no question warranting review.

First, there is no merit to petitioners' argument that, because common questions did not "*predominate*" under Rule 23(*b*)(3) in *Amchem*, such questions do not *exist* under Rule 23(*a*)(2)-(3) in this case.* To the contrary, *Amchem* addressed the "far more demanding" predominance requirement on the assumption that the less-demanding Rule 23(a) "commonality requirement may be satisfied by [the] shared experience" of class members in being "exposed to asbestos products supplied by defendants." 117 S. Ct. at 2250. Accordingly, the commonality and typicality threshold is *a fortiori* satisfied here, where class members share not only that "experience," but also the central claims in this case — that they are entitled to the insurance proceeds subject to the coverage dispute. App. 3a.

Second, this case does not present the intraclass conflict identified in *Amchem* between currently injured and "exposure-only" class members. Rather than creating internal conflicts, the Global Settlement's principal provisions — securing over $1.5 billion of disputed insurance coverage to compensate the class — greatly benefit *all* class members, currently injured and exposure-only alike, since they *all* would otherwise have faced the "real and enormous" risk that a Fibreboard loss in the coverage litigation would have left each of them without any meaningful compensation at all. App. 76a, 58a. As the courts below found, this "common interest" of class members in the Global Settlement "vastly overwhelmed" and "far outweighed any divergent interest the intraclass groups may have," and "during the process of negotiations there was no competition

* As noted above, the "predominance" requirement does not apply to this 23(b)(1)(B) class action. *Amchem*, 117 S. Ct. at 2249 n.19.

for insurance funds between [these groups of] claimants." App. 69a-70a, 421a-422a. This overriding "*common*" interest among the two groups was totally lacking in *Amchem*.*

Moreover, as the Fifth Circuit's opinion on remand recognized, this case, unlike *Amchem*, involves a class settlement under Rule 23(b)(1)(B). Although Rule 23(a)(4)'s adequate-representation requirement applies fully in Rule 23(b)(1)(B) cases, the inquiry must be informed by the type of class certification at issue. Rule 23(b)(1)(B) calls for a unitary class resolution in the relatively rare circumstance in which allowing individual class members to maintain "separate actions" seeking full recoveries on their own would "as a practical matter" prejudice *other* class members' claims. Rule 23(b)(1)(B) class actions thus *often* — by definition — involve some degree of tension within the class. Yet they have traditionally been resolved on a *unitary* basis. App. 81a-84a. The reason is that, in the narrow set of circumstances in which the Rule applies, the class's predominant interest — to secure and equitably distribute otherwise potentially unavailable funds — is a *common* one, and any "competition" for those funds is then "controlled" by the court for "the benefit of all members of the class." App. 3a. And *Amchem*, which took pains to note that the case did not involve Rule 23(b)(1)(B), says nothing to the contrary.

II. PETITIONERS' OBJECTIONS TO NON-OPT-OUT CLASS TREATMENT ARE NOT CERTWORTHY.

Citing virtually no cases, much less a conflict among the lower courts, the petition next theorizes that the certification of this class under Rule 23(b)(1)(B) transgresses Rule 23 and a potpourri of statutes. These musings do not merit review.

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* In addition, the Global Settlement also contains *none* of the specific terms found to create a conflict between the two groups in *Amchem*. There is no prohibition on inflation adjustments, which may be fully considered by the Trust; all class members have an *absolute* right to exit to the tort system; no causes of action are extinguished without compensation; and the Global Settlement does not invite tradeoffs between groups of class members by setting different compensation ranges for different groups. *Contrast Amchem*, 117 S. Ct. at 2251.

1. For all petitioners' complaints about the Fifth Circuit's alleged "shoehorn[ing]" of this case into Rule 23(b)(1)(B) (Pet. 17), they *never once* dispute that this case falls squarely within the plain language of that Rule. That language calls for a unitary resolution where allowing individual opt-outs would "create a risk" that other class members would "as a practical matter" suffer a "substantial[ ] impair[ment] . . . [of] their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(B). In other words, in the view of the Advisory Committee (which drafted the Rule), this Court (which endorsed it) and Congress (which passed upon it), individuals cannot opt out of a class where their doing so would substantially prejudice their fellow class members' claims. And that is exactly what the courts below found would have happened here, by creating the serious risks that all of the class would have recovered nothing via the coverage litigation or that much of the class would have recovered nothing under the Trilateral Agreement. App. 77a, 81a, 357-358a. As the Fifth Circuit put it, "[n]o one contests th[is] finding, . . . probably because it is incontestable." App. 2a.*

2. Petitioners' Rules Enabling Act contention consequently faces the presumption that the Rule's plain language does not "transgress[ ] . . . the terms of the Enabling Act." *Hanna* v.

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* Moreover, petitioners' claim that the Fifth Circuit's application of 23(b)(1)(B)'s plain language would render "*every* settlement of class claims for money damages" eligible for class treatment under that Rule (Pet. 19) is based upon a caricature of the opinion below. The Fifth Circuit did *not* certify the class on the basis of a "settlement fund" that is "limited only in the sense that literally *every* settlement is limited." Pet. 19. Rather, it recognized that, absent a unitary resolution, the class's source of recovery would potentially be lost for reasons *unrelated* to the merits of the class's claims: through a potential Fibreboard loss in the coverage litigation. App. 76a-77a. This holding, as the District Court explained, does *not* support the certification of a mandatory class "in the typical case where a class action is settled with a defendant's own funds, or with insurance funds that are not the subject of genuine and vigorous dispute" — in such a case, "if the settlement failed because [opt outs] were permitted, the defendant would retain the settlement funds (or the insurance coverage) and there might not be the 'impair[ment]' to class members' 'ability to protect their interests' required for mandatory class certification" by the language of Rule 23(b)(1)(B). App. 233a.

Plumer, 380 U.S. 460, 471 (1965). Petitioners, however, have offered nothing to overcome this presumption. They offer only the *ipse dixit* — for which they cite only out-of-context snippets of certain questions asked at oral argument in other cases — that class members have a "substantive right" to seek judgments on their individual claims "*in full*," even where their doing so would irretrievably prejudice the rest of the class's claims. They then assert that the Rules Enabling Act forbids the compromise of this supposed "right" through a mandatory class resolution that does not guarantee "full" recovery. Pet. 15-16.

This breathtaking assertion would effectively render non-opt-out class resolutions impermissible in virtually *any* Rule 23(b)(1)-(b)(2) case, contrary to settled law. Absent class members can *always* assert this supposed "substantive right" to "full" recovery: for example, to the most money or the broadest injunction or declaration an individual class member may desire. And these class members can likewise *always* complain that a mandatory class resolution that gets them less than everything they desire (as will happen inevitably in settlement and often in litigation) is an illegitimate forced compromise of this "substantive right" through the rules of procedure.

3. Seeking to mitigate these absurd consequences of their position, petitioners ultimately rest on a hair-splitting distinction that they do not even argue has any basis in the language of Rule 23(b)(1)(B) or so much as a *single* decided case. Quoting the dissent below, they insist that Rule 23(b)(1)(B)'s plain language cannot be applied here because "the purpose of the suit is to establish . . . rights and not to divide preexisting rights" (Pet. 18): in other words, a unitary resolution would have been permitted had class members' claims sought "equitable relief" in the form of "*in rem* claims" asserting a "preexisting interest" in a "fund" or "specific property," but such a resolution was somehow impermissible here because class members needed a unitary resolution in order to secure a fund to compensate them in the first place. Pet. 15, 17-18.*

* In an attempt to create the impression that Rule 23(b)(1)(B)'s Advisory Committee Note would limit the Rule's operation in the manner they propose, petitioners selectively quote those Notes as confining the Rule to "*in rem* claims 'made by numerous persons against a fund insufficient to satisfy all claims.'" Pet. 17. This carefully excises the Notes' statement three sentences later that the Rule is in fact to operate "in the *absence* of a fund either present or potential." Advisory Committee Notes to 1966 Amendment to Rule 23(b)(1)(B) (emphasis added).

Petitioners, however, never reveal the basis for or significance of this "distinction." In particular, they offer no reason why, if each class member indeed has a "substantive right" to "full" recovery, that right can *ever* be limited in order to avoid prejudice to other class members' claims. This includes the situation petitioners posit: even where a class of plaintiffs has a "preexisting interest" in an insufficiently large "fund," each class member may have an individual claim to a 100-cents-on-the-dollar, disproportionate share of that fund. The petition is resoundingly silent as to why, if these individual rights to seek "full" recovery can be "limited" and "divided" (Pet. 18) to protect the class's overall interest, the same was impermissible here: indeed, class members here were *more* in need of a unitary resolution, since the alternative was not merely a risk of inequitable allocation of a "preexisting fund," but a risk that Fibreboard would have lost the coverage dispute and that *no* fund would have existed at all.

Moreover, far from having any basis in the law when the Rules Enabling Act was enacted in 1938, petitioners' "distinction" is belied by centuries-old settled practice which, as the Fifth Circuit explained, instead embodied the *precise* approach adopted by the plain language of Rule 23: the propriety of a unitary resolution turns on whether "equitable circumstances dictate the need for a unitary adjudication," not on whether the class is asserting "*in rem*" claims to "divide preexisting rights" in a "preexisting" fund. App. 81a-83a.*

* Indeed, as the Fifth Circuit explained, Rule 23(b)(1)(B) is the present-day equivalent of these traditional class actions. App. 81a-82a; *see* Advisory Committee Notes to 1966 Amendment to Rule 23(b)(1)(B) (specifically referring to *Smith* v. *Swormstedt*, discussed below, as an example of an action falling within the Rule). By contrast, Rule 23(b)(3) requires opt-out rights in those actions that would *not* have qualified for class treatment at common law because class members would not be prejudiced by allowing separate suits, but as to which current procedure allows class resolution of certain "common questions" where "convenient and desirable" to "achieve economies of time, effort and expense." Advisory Committee Notes to 1966 Amendment to Rule 23(b)(3).

For example, in *Smith* v. *Swormstedt*, 57 U.S. [16 How.] 288 (1853), this Court upheld a unitary resolution "to prevent a failure of justice" in circumstances much like those presented here: where persons with "separate and distinct" monetary claims against a pool of disputed assets brought a nationwide class suit to advance their "common interests" in establishing their joint ownership of the disputed funds and a process for equitably distributing them, but where that relief could be achieved only through a unitary resolution. *Id.* at 302-03. Likewise, unitary resolutions of monetary claims were permitted at common law where necessary to prevent "a positive denial of justice" to class members. Story, *Commentaries on Equity Pleadings*, § 100 (2d ed. 1840); *see also id.* at §§ 97-98, 120-21. And it was well recognized that the circumstances permitting a unitary resolution included suits — precisely like that here — to establish a class's joint rights to disputed assets and a process for equitably distributing them. *See Leigh v. Thomas*, 28 Eng. Rep. 201 (Ch. 1751) (mandatory class action brought by two members of the crew of a privateer ship as representatives for the entire crew to establish crew members' rights to a share of prize money); *Good* v. *Blewitt*, 33 Eng. Rep. 343 (Ch. 1807) (same).*

These cases totally belie petitioners' notion that a unitary resolution may be used only to "divide preexisting rights" to a fund, and not to "establish" those "rights" in the first place (Pet. 18): indeed, the object of the class in each of these cases was precisely to "establish" the class's joint rights to the disputed funds. These cases similarly reject petitioners' rigid code-pleading distinctions between "equitable" "*in rem* claims" and "*in personam*" claims. In *Smith*, this Court thus made clear that a court's power to achieve a unitary resolution "to prevent a failure of justice" extends to "[t]he *legal* and equitable rights and liabilities of all being before the court by representation." 57

* Mandatory "representative suits involving money claims were adjudicated in equity as a matter of course from early times" in those circumstances where class members' claims would otherwise be prejudiced. Z. Chaffee, *Some Problems of Equity* (1950), at 285; *see, e.g.*, *Brown* v. *Vermuden*, 22 Eng. Rep. 796 (Ch. 1676); *Brown* v. *Booth*, 21 Eng. Rep. 960 (Ch. 1690); *Chancey* v. *May*, 24 Eng. Rep. 265 (Ch. 1722); and *Adair* v. *New River Co.*, 32 Eng. Rep. 1153 (Ch. 1805).

U.S. at 303 (emphasis added); *cf. Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 312-13 (1950) (availability of a unitary resolution "do[es] not depend upon a classification" between "*in rem* and *in personam*" actions). Similarly, at common law, it was "immaterial" to the propriety of a unitary resolution whether "the basic issues [were] legal and not equitable." Chaffee, *supra*, at 156; *see also id.* at 151-52; *Adair* v. *New River Co.*, 32 Eng. Rep. 1153, 1159 (Ch. 1805) (describing the practice as allowing "a person, having at *Law* a general right . . . [to] sue thus in Equity," and as requiring only that enough of the individual class members be brought into court "that it can be said, they will fairly and honestly try the *legal* right between themselves, all other persons interested, and [the party opposing the class]") (emphasis added).

Indeed, many of these cases involved classically *in personam* claims. For example, *Smith* involved class members' assertion of "separate and distinct" legal claims of ownership of disputed funds as a matter of contract interpretation (57 U.S. at 302); *Chancey* v. *May*, 24 Eng. Rep. 265 (Ch. 1722), involved fraud claims; *Adair* involved alleged rent overpayments under a contract; and *Mullane* expressly involved *in personam* tort claims for money damages (339 U.S. at 311-14).

In short, petitioners' invented, unsupported effort to engraft an "equitable *in rem*" limitation on Rule 23(b)(1)(B)'s plain language presents neither a division of authority nor any other reason for this Court's review.

4. Finally, as the Fifth Circuit explained in detail, the application of Rule 23(b)(1)(B)'s plain language in this case conflicts neither with the Bankruptcy Code nor with *Keene Corp.* v. *Fiorelli*, 14 F.3d 726 (2d Cir. 1993). App. 74a-79a. As noted above, class members could not have put Fibreboard into bankruptcy without first forcing it to continue and lose the coverage litigation. *See* p. 11, *supra*. Their colorful rhetoric notwithstanding, petitioners never identify exactly what in the Bankruptcy Code required the class to adopt this absurd course, forcing everyone to await "catastrophe" in the coverage litigation (App. 77a) and suspending in the interim the normally available procedures of Rule 23(b)(1)(B). To the contrary, the

Bankruptcy Code expressly permits the district courts to sanction a resolution outside of bankruptcy where the relevant interests would be "better served." 11 U.S.C. § 305(a)(1).*

Keene, by contrast, was different on every level. There, a former asbestos manufacturer tried to evade an immediate and otherwise unavoidable bankruptcy through a "preemptive" mandatory defendant class action seeking to *compel* all claimants to "settle" with it where no settlement existed at all. *See id.* at 728. The Second Circuit dismissed this "suit" for lack of a case or controversy and expressly did not decide the propriety of Rule 23(b)(1)(B) certification *(see id.* at 728,730 & n.1, 733); the portion of its opinion relied upon by petitioners is, in the Fifth Circuit's words, a "gratuitous discussion" and does not amount to a conflict warranting this Court's review. App. 75a n.14. (In contrast, on the occasions that the Second Circuit has actually *decided* the issue — including one decision *subsequent* to *Keene* — it has squarely held that Rule 23(b)(1)(B) *may* properly be applied in appropriate cases involving insolvent entities. *See In re Joint E. and S. Dist. Asbestos Litig.*, 78 F.3d 764, 777-78 (2d Cir. 1996); *In re Joint E. and S. Dist. Asbestos Litig.*, 982 F.2d 721, 737-39 (2d Cir. 1992); *In re Drexel Burnham Lambert Co.*, 960 F.2d 285, 292 (2d Cir. 1992).) Even the *Keene* dictum, however, is fully consistent with the decision below. *Keene* involved a situation where, unlike here, class members *could* put the former asbestos manufacturer into bankruptcy immediately. The Fifth Circuit emphasized its agreement that, in those circumstances, "a 23(b)(1)(B) action was not appropriate." App. 76a.

III. THIS CASE DOES NOT PRESENT THE DUE PROCESS ISSUE RAISED IN *ADAMS* AND *TICOR*.

Nor does this case present the question the Court was unable to reach in *Adams v. Robertson*, 117 S. Ct. 1028 (1997), and

* Petitioners badly distort the Fifth Circuit's opinion in contending that it relied on § 305(a)(1) as "a grant of authority" to "ignore" restrictions on its powers. Pet. 20-21. What the Fifth Circuit actually held was that this section refuted petitioners' claim that, in the circumstances of this case, the Bankruptcy Code divested the court of the *authority it otherwise possessed under Rule 23(b)(1)(B)*. The plain language of § 305(a)(1) shows that the Fifth Circuit was clearly correct in this regard.

Ticor Title Ins. Co. v. Brown, 511 U.S. 117 (1994). Those cases each involved the issue whether rules of procedure may constitutionally provide for certification of a mandatory class action that "extinguished [class members'] money damages claims" where there was *no* claim by the parties that affording opt-out rights would have prejudiced those claims. *Ticor*, 511 U.S. at 119; *see Adams*, 117 S. Ct. at 1029 ("preclu[sion]" of fraud claims). Here, by contrast, petitioners do not contest that the plain language of Rule 23(b)(1)(B) calls for a unitary resolution on the facts of this case, or that many class members would be severely prejudiced and potentially recover nothing on their claims if opt-outs were instead permitted. Accordingly, unlike the novel issues in *Adams* and *Ticor*, petitioners' due process claims fly in the face of long-settled precedent, and do not warrant this Court's review.

1. Petitioners first contend that — no matter how draconian the consequences to the class — the courts are constitutionally foreclosed from achieving a unitary resolution whenever the class asserts "*in personam*" claims. Pet. 23. This contention is contrary to the historical precedents, which reject petitioners' formalistic *in rem/in personam* distinction and establish instead that opt-out rights are not required where a unitary resolution is necessary to protect the class. *See* pp. 21-23, *supra*.

Moreover, petitioners' argument is also flatly contrary to the square holding of this Court in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). There, this Court considered an identical due process challenge to a unitary resolution of *in personam* money damage claims arising out of alleged negligent mismanagement of a trust where such a resolution was necessary to achieve a "final settlement" of all claims involving the trust. *Id.* at 310-14.* The petitioners there likewise claimed that a unitary resolution violated their due process rights to the extent it encompassed *in personam*, as

* Although *Mullane* was not technically a class action, it nonetheless involved a mandatory representative settlement encompassing absent and future parties from around the nation (who were represented by guardians ad litem). *See* 339 U.S. at 309-11. The Court's rejection of the due process challenge in *Mullane* is accordingly fully applicable here.

opposed merely to *in rem*, claims. The Court squarely rejected this contention, holding that "the requirements of [due process] do not depend upon [this] classification. . . . Without disparaging the usefulness of distinctions between actions *in rem* and those *in personam* in many branches of law . . . we do not rest the power" to achieve a unitary resolution upon "this historic antithesis." *Id.* at 312-13. Petitioners present no reason why this Court should reexamine this settled law.*

2. Petitioners' fallback position — that this Court should review whether, in a class action such as this one, opt-out rights must be given to class members "who lack minimum contacts with the forum state" — is likewise not certworthy. This contention too is contrary to settled law — as typified by this Court's prior decisions in *Smith* and *Mullane*, both of which explicitly upheld mandatory resolutions binding absent plaintiffs who lacked *any* contact with the forum state. *Mullane*, 339 U.S. at 309, 311; *Smith*, 57 U.S. at 289, 303. Nothing in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), says otherwise. As the Fifth Circuit observed, *Shutts* involved a "class action brought under a state rule virtually identical to [Rule] 23(b)(3)" (App. 81a) — that is, the class was certified merely for litigation convenience. The Court's holding requiring opt-out rights in that context therefore did not alter the settled validity, exemplified by *Smith* and *Mullane*, of mandatory nationwide class actions involving monetary claims where a need for a unitary resolution *does* exist. Indeed, the *Shutts* opinion was limited to "those class actions which seek to bind

* Petitioners' claim of a conflict with *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), *cert. dismissed as improvidently granted*, 511 U.S. 117 (1994), is without merit. In that case — which was the lower court decision leading up to *Ticor* — a mandatory class was certified under Rule 23(b)(1)(A) and (b)(2) with respect to a "hybrid" action involving both equitable relief and "*foreclosure* of substantial damage claims" where there were no circumstances requiring unitary resolution of the damage claims. Putting aside whether the underlying certification of a mandatory class in that action was proper under Rule 23, it is plainly distinguishable from this case, where there was an overriding need for a unitary resolution to ensure a source of recovery for the class and in which individual damages will not be adjudicated.

known plaintiffs concerning claims wholly or predominately for money judgments" and "intimate[d] no view concerning other types of class actions, such as those seeking equitable relief." 472 U.S. at 811-12 n.3.* Finally, there is no conflict on this point with *In re Real Estate Title*, 869 F.2d 760 (3d Cir. 1989). To the contrary, that case arose out of the same "hybrid" class action that eventually gave rise to *Ticor*, in which there was likewise no need for a unitary resolution; the Third Circuit thus specifically noted that its decision did not "address the due process requirements in a class action certified under Rule 23(b)(1) in which there is only a limited common fund from which the plaintiffs can obtain relief." *Id.* at 768 n.8.

IV. THE NOTICE ISSUE IN *AMCHEM* IS NOT PRESENTED HERE.

Petitioners' one-paragraph notice argument is based entirely on the notion that *Amchem* "recognized" the importance of the notice "issue" in this case. Pet. 25. It did not. Instead, the question this Court "recognized" in *Amchem* regarding notice to a futures class was in the context of a Rule 23(b)(3) case, in which class members needed to make immediate, front-end opt-out decisions. Accordingly, this Court specifically stated that its concern was whether current notice could provide unknown or future claimants with "the information . . . needed to decide, intelligently, whether to *stay in or opt out*." *Amchem*, 117 S. Ct. at 2252 (emphasis added). This concern plainly has no appli-

* As the Fifth Circuit explained, far from invalidating Rule 23(b)(l)(B)'s plain language, *Shutts* thus recognized the basic distinction made in Rule 23: unitary resolutions are permitted of those actions that fall within the federal courts' authority to fashion "equitable relief" to protect the class — class actions under Rules 23(b)(l)-(b)(2), which are the present day equivalents of the traditional equitable class action. App. 81a-83a & n.16. In addition, *Shutts* is also distinguishable for two further reasons: (1) its holding was expressly limited to class actions involving "known plaintiffs" (472 U.S. at 811-12 n.3), and thus by its terms has no applicability to this futures class action. (2) *Shutts* involved a class action brought in *state* court, and has no bearing on this *federal* class action. Whereas state courts can ordinarily assert jurisdiction only over parties having minimum contacts with the state, the Constitution permits federal courts to assert jurisdiction nationwide. *See, e.g., United States v. Union Pac. R.R. Co.*, 98 U.S. 569, 604 (1878).

cability to a Rule 23(b)(1)(B) class such as this one in which no opt-out decision is involved. Instead, it is well-settled that — at least where no opt-out decision is involved — in the case of "conjectural or future" claimants the Constitution requires only provision of the best notice "reasonably possible or practicable," because "in the case of persons missing or unknown, employment of an indirect or even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights." *Mullane*, 339 U.S. at 317.* As the District Court found (App. 452a-456a), and as appellants do not contest, the best notice "reasonably possible or practicable" was clearly provided here.

V. PETITIONERS' CONTRIVED ARTICLE III CLAIMS DO NOT WARRANT REVIEW.

The Article III "issues" raised in the petition are at odds with settled law and do not warrant review. Notwithstanding petitioners' derision of this case as a "feigned proceeding" and a "contrivance among friends" (Pet. 26-27), there can be no dispute that there was a real controversy among the class, Fibreboard and the insurers before the Global Settlement was reached. App. 86a-88a. Instead, petitioners' rhetorical flourishes all boil down to this: they contend that this indisputably real controversy was transformed into an unconstitutional "contrivance among friends" because the terms of a settlement were reached prior to the filing of the complaint, and the action was then "filed to obtain judicial approval of [the] settlement." Pet. 27.

Settled law has dismissed this proposition ever since this Court's decision in *Swift & Co. v. United States*, 276 U.S. 311, 326 (1928), rejected an identical Article III objection to a consent decree that was likewise reached prior to the filing of a complaint and was then presented to the District Court for approval concurrently with the filing of a complaint. *Swift*'s holding has been uniformly applied by the courts of appeals, and such consent decrees (and related settlements such as pre-packaged bankruptcies) have become a regular practice allowing parties to resolve their differences without first instituting often compromise-inhibiting litigation while at the same time not forfeiting potential judicial oversight of issues that may arise.* There is no reason for the Court to revisit this issue.

Nor is there any plausible distinction of *Swift*. Indeed, *Swift*'s holding applies *a fortiori* in this class action context, because Rule 23(e) affirmatively *requires* court approval of class settlements. For this reason, this Court has held that the existence of a class settlement does not end an Article III controversy until approval is received. *Havens Realty v. Coleman*, 455 U.S. 363, 371 n.10 (1982). And the effect of petitioners' argument on class actions would be absurd. In addition to invalidating the practice of consent decrees and pre-packaged bankruptcies, petitioners would institute a regime in which potential class litigants could not even talk prior to litigating, for if such talk led to a settlement before a complaint were filed, Article III would bar them from getting the necessary approval.

Equally without merit is petitioners' alternative argument (Pet. 28-29) that the "exposure only" class members lack injury in fact. This contention centers on the remarkable assertion that persons exposed to asbestos have no justiciable interest in pursuing an action designed to ensure that funds remain available to them when they subsequently contract asbestos-related diseases. For that is what this action does: as the Fifth Circuit put it, this case "does not purport to make any determination of the validity or amount of" exposure-only class members' claims; instead, it "address[es] the immediate and important controversy of whether [they] will be able to receive compensation for their injuries before Fibreboard runs out of money." App. 85a.

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* Based on this settled law, moreover, the courts routinely decide non-opt-out class action suits involving claims on behalf of unknown, future claimants — such as future schoolchildren, future housing tenants, future employees and future prisoners. *E.g.*, *Missouri v. Jenkins*, 495 U.S. 33, 37 n.2 (1990); *County of Riverside v. McLaughlin*, 500 U.S. 44, 49 (1991); *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 193 (1991). Similarly, as the Fifth Circuit noted, Rule 23(b)(1)(B) class actions "often involve unknown or unavailable claimants" and "bind[ ] future, contingent and unknown claimants." App. 84a.

* *See, e.g.*, *SEC v. Randolph*, 736 F.2d 525 (9th Cir. 1984), *United States v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980); *see also* 13 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3530, at 320.

Petitioners' notion that Article III prevents exposure-only class members from protecting themselves in this regard until their injuries appear years later — by which point the potential funds to compensate them may no longer exist — is totally at odds with settled law. *Duke Power v. Carolina Environmental Study*, 438 U.S. 59, 72-74 (1978); *In the Matter of UNR Industries*, 20 F.3d 766, 769 (7th Cir.); *In re Agent Orange*, 996 F.2d 1425, 1433-38 (2d Cir. 1993). And petitioners' refrain that these class members potentially could not as of this moment recover money damages under state law is beside the point: they brought this action not to recover damages now, but to ensure the availability of funds when they do develop indisputably compensable injuries. They unquestionably have standing to do so. *See, e.g., UNR Industries*, 20 F.3d at 770.*

Finally, petitioners' argument that future claimants lack standing to protect rights they will develop in the future is impossibly overbroad. A partial list of the settled practices it would invalidate includes: the payment and discharge of future claims in bankruptcy (*e.g., UNR Industries*, 20 F.3d at 770-71); actions brought on behalf of unborn heirs or those with future or contingent interests, such as those regarding trusts (*e.g., Mullane*, 339 U.S. at 316-17); actions to impose equitable receiverships or constructive trusts for the benefit of future victims (*e.g., In re Joint E. and S. Dist. Asbestos Litig.*, 982 F.2d 721 (2d Cir. 1992); and class actions on behalf of future prisoners, future schoolchildren or future housing tenants (*see* p. 28n.*, *supra*). The decision below thus (again) rests on settled law, and there is no warrant for further review.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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* Moreover, petitioners' cite no authority for their claim that exposure-only asbestos plaintiffs cannot recover money damages immediately. To the contrary, exposure-only claims *are* permitted in many states — including California, where Fibreboard is subject to personal jurisdiction. App. 252a; *Potter v. Firestone*, 863 P.2d 795, 816 (Cal. 1993); *Miranda v. Shell Oil Co.*, 15 Cal. Rptr. 2d 569 (Cal. App. 1993).

Dated: May 18, 1998

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OCTOBER TERM, 1997

ESTEBAN ORTIZ, *et al.*,
Petitioners,

v.

FIBREBOARD CORPORATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PARTIES TO THE PROCEEDING

The parties to the proceeding are accurately described in the petition except that James Drake and Juanita Drake are not plaintiff class representatives (and, indeed, as far as respondents are aware, were not parties below) and William Mitchell is an additional class representative and a respondent herein.

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COUNTER-STATEMENT OF THE CASE[1]

This is the *Ahearn* case not the *Amchem* case, although one could not tell that from the two petitions for certiorari filed herein. To transmute the one into the other as they must to support their arguments urging certiorari, petitioners assiduously ignore the *Ahearn* factual record and grossly mischaracterize the fundamental controversy among the parties that drove *this* settlement, caused the District Court and the Fifth Circuit to approve it, and caused the Fifth Circuit to reaffirm it on remand from this Court after *Amchem* was decided.

To say that petitioners ignore the factual record is not hyperbole. The Flanagan petitioners do not even print the District Court's Findings of Fact and Conclusions of Law in their appendix; although the Ortiz petitioners print both, they never refer to either. Petitioners do not contend that any specific factual findings of the District Court were clearly erroneous or that the Court of Appeals erred in failing to so hold. Rather, petitioners simply revise the facts as needed to make their arguments sound legal rather than factual in nature.

As described at length in the District Court's findings, this dispute and its resolution are very different from *Amchem*. This 1993 settlement arose out of a 14-year

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[1] This brief is being filed on behalf of respondents Gerald J. Ahearn, James R. Dennis, Charles W. Jeep, William J. Mitchell and James Ellison (collectively the "class representatives") in opposition to the petition for certiorari filed on behalf of Esteban Ortiz, *et al.* (cited as "Pet."). Respondents are not filing a separate brief in opposition to the petition for certiorari filed by James Flanagan and David H. Middleton (No. 97-1695) in this case, but the arguments contained in this brief are equally applicable to the Flanagan petition. Citations to the Appendix ("App. __") are to the appendix to the Ortiz petition.

insurance coverage litigation between Fibreboard and its insurers, Continental and Pacific (the "coverage case"). App. 266a-270a. Depending on the resolution of that litigation, either Fibreboard would have virtually unlimited insurance for its asbestos liabilities (App. 268a) or Fibreboard would be hopelessly insolvent — its existing $235 million enterprise value dwarfed by the more than $1.2 billion of outstanding settlement obligations it had already incurred by the end of 1992. App. 303a, 377a. Thus, as of 1993, compensation not yet paid to persons exposed to Fibreboard's asbestos-containing products for their resulting injuries (whether already manifested or to occur in the future) was completely at the risk of an unfavorable outcome in the coverage case. App. 272a-276a, 357a-358a.

Class counsel were aware of the enormity of this risk. They had been separately representing individual plaintiffs against Fibreboard for over a decade in thousands of cases that were resolved either for partial payments, coupled with promises to pay the balance in the future when and if insurance funds were available, or by assignments of Fibreboard's disputed insurance rights against Continental. App. 277a-279a, 285a-288a. Those settlements with Fibreboard included a 1992 multi-state assignment settlement (aggregating thousands of separate pending cases), executed over the objection of Continental, that was led by two of class counsel from the Ness Motley firm. Litigation of the validity and enforceability of that assignment settlement against Continental was commenced before the District Court in early 1993 and subsequently resolved by a modification of the settlement acceptable to Continental that was submitted to the District Court for fairness approval. App. 302a-303a, 317a-319a. Also, for two years beginning in early 1991, class counsel had been negotiating with Fibreboard a possible global insurance assignment settlement involving a class of all

present and future claimants. By the spring of 1992 those negotiations had proven to be unworkable. App. 291a-302a.

By the time Fibreboard and Continental jointly reopened settlement negotiations with class counsel following Judge Parker's approval of the modified Ness Motley settlement on August 9, 1993, class counsel, Fibreboard and Continental were all faced with imminent argument and decision in the California intermediate appellate court of the critical issues in the coverage case. App. 270a, 330a-331a. Fibreboard and Continental had previously proven themselves unable to settle the insurance dispute because, among other things, Fibreboard was unwilling to accept any amount in settlement that would not, in its judgment, cover its entire asbestos exposure to existing and future claimants whose claims were potentially covered by the Continental and Pacific policies together with the costs of defending all those claims in the tort system. App. 301a-302a, 329a-330a; Tr. 604, 1378. For Fibreboard, a settlement anywhere short of that goal was little better than losing the coverage case since it would lead, inevitably, to bankruptcy. Conversely, Continental was unwilling to offer an amount large enough to satisfy Fibreboard since to do so would have represented capitulation, notwithstanding the many defenses to coverage that Continental was asserting.[2]

Faced with the choice of watching Fibreboard and Continental roll the dice, and thereby risking the total loss of any prospect of meaningful recovery for the tens of thousands of class members holding potential asbestos-related claims

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[2] Pacific had entered into a separate settlement with Fibreboard in 1992 that provided up to $330 million that could be used to pay so-called post-1959 claims – claims that were otherwise uninsured. Payment of the bulk of the funds in that settlement – some $225 million – was conditioned on barring Continental's contribution claims against Pacific based on their mutually overlapping pre-1959 insurance. App. 282a-285a.

against Fibreboard, class counsel agreed in August 1993 to reopen negotiations with Continental and Fibreboard, joined subsequently by Pacific, for a three-way non-opt-out settlement of all insurance coverage issues. App. 321-322a, 325a-326a. By August of 1993, these issues included not only those raised in the coverage case itself but the question whether, assuming that coverage was otherwise available, Fibreboard's previous assignment settlements were enforceable against Continental or whether they constituted a breach of Fibreboard's insurance contract with Continental, thereby potentially forfeiting Fibreboard's coverage rights under the policy. App. 228a. This separate issue was being concurrently litigated in the *Andrus* case in California in which one of class counsel was involved. App. 198a, 288a-290a; *see also* Fib. Trial Ex. 304.[3]

These insurance coverage issues posed monumental risks to the class of persons holding potential asbestos claims against Fibreboard. As the testimony at the settlement fairness hearing detailed, there was a substantial possibility that the California appellate courts would significantly roll back Fibreboard's trial court victory in the coverage case. App. 275a-276a. Indeed, a California intermediate appellate court subsequently held, in *Andrus*, that the Fibreboard assignment settlements were breaches of its agreements with Continental. App. 379a-380a.

It was under these circumstances that an agreement in principle to a $1.535 billion global settlement (the "Global Settlement") was reached among the parties on August 27,

[3] Also at issue was whether Continental was entitled to contribution from Pacific – an issue being litigated in a separate action before Judge Parker involving the Ness Motley settlement. App. 303a. This latter issue was ultimately settled between Pacific and Continental in the course of the August 1993 multi-party global negotiations. App. 325a-326a.

1993, on behalf of a class of persons who had been exposed to Fibreboard asbestos products but who had not yet filed suit against Fibreboard. App. 329a-331a.

In addition, as further protection for the class's need for a resolution of the insurance risk, class counsel insisted as a condition of the Global Settlement that the insurers and Fibreboard negotiate and agree to a separate back-up settlement of the insurance disputes (the "Trilateral Settlement") against the eventuality that, for any reason, the Global Settlement could not receive court approval. App. 329a-330a. Fibreboard objected to this condition because Continental declined to pay any more in the Trilateral Settlement for future claims than the $1.525 billion it had agreed to pay for those claims in the Global Settlement.[4] App. 330a. Fibreboard's objection was based on the fact that, were the Trilateral Settlement ever to become operational, Fibreboard would have much less money to pay claimants because it would incur hundreds of millions of dollars of defense costs in litigating future claims in the tort system — costs that would be altogether eliminated under the Global Settlement. App. 330a, 362-365a.

As a result of Fibreboard's concern about its potential financial exposure under the Trilateral Settlement, it took from August 27 to October 12, 1993, for Fibreboard and the

[4] Continental did agree to pay an additional $475 million in the Trilateral Settlement to cover claims of persons who had already filed lawsuits against Fibreboard, but not yet settled or gone to judgment in those cases as of August 23, 1993. This group of persons was not included in the class involved in the Global Settlement. App. 354a-355a, 552a-575a. Because the class of claimants covered by the Trilateral Settlement includes this large group of additional persons, petitioners' statement that the Trilateral Settlement provides "half a billion *more*" than the Global Settlement (Pet. 4) compares apples and oranges and is extremely misleading.

insurers to reach a definitive written agreement on the Trilateral Settlement. App. 332a-335a. In the meantime, on September 9, 1993, class counsel had filed the complaint against Fibreboard that initiated the *Ahearn* class action, the insurers had intervened, and all parties had jointly requested certification, for settlement purposes only, of a non-opt-out class pursuant to Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure. App. 334a.

Following execution of the Trilateral Settlement on October 12, 1993, the parties began negotiations of the definitive written Global Settlement agreement, including, in particular, the negotiation of the Trust Distribution Process ("TDP"). The TDP set forth the procedures by which individual class members would obtain resolution and payment of their claims against Fibreboard, which claims in turn would be channeled to the trust created by the Global Settlement. App. 346a-347a, 583a-621a. Those negotiations were not finally completed, and the Global Settlement agreement and related documents (including the TDP) were not executed, until December 23, 1993. App. 335a-336a. Thereafter, the settlement approval process, which is now before the Court, commenced. During the course of an eight-day settlement hearing before the District Court, neither the Ortiz petitioners, the Flanagan petitioners, nor any other class members contested the fairness of the settlement amount.

Notwithstanding the foregoing undisputed facts of record, petitioners try to portray this case as an attempt by venal plaintiffs' lawyers to aggregate the unaccrued personal injury claims of a disparate class of mostly uninjured persons into a cheap settlement with a wealthy asbestos manufacturer that illegitimately sacrifices class members' legal and constitutional rights to prosecute their individual tort claims as they choose. As an added embellishment, petitioners mischaracterize the claims-handling procedures established by

the TDP as a form of legislative alternative dispute resolution being inflicted on the class by the District Court and the Fifth Circuit. From those two entirely false factual premises, virtually all their legal arguments flow.[5]

REASONS FOR DENYING THE WRIT

I. THE FIFTH CIRCUIT'S DECISION IN THIS CASE IS NEITHER CONTRARY TO NOR INCONSISTENT WITH *AMCHEM*

Petitioners urge certiorari on the theory that the Fifth Circuit, on remand from this Court, refused to follow *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997). First, petitioners assert that the Fifth Circuit failed to follow *Amchem* by using the settlement itself as the basis for its determination that the commonality and typicality requirements of Rules 23(a)(2) and (a)(3) were satisfied. Second, petitioners claim that the instant case involves the same conflict of interest between two groups of class members that this Court held in *Amchem* precluded satisfaction of the adequacy of representation requirement of Rule 23(a)(4). Pet. 11-15. Neither of these arguments has any basis in fact or law and there is no conflict with *Amchem*.

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[5] The record in this case is extensive, although one would not know it from reading either the petitions or Judge Smith's dissenting opinions on which petitioners heavily rely. After hearing all the evidence presented at an eight-day evidentiary hearing (which was preceded by massive discovery taken by petitioners), the District Court resolved a number of factual disputes in the course of approving the Global Settlement. Petitioners do not challenge the proposition that the District Court's resolution of these factual disputes is subject to review for clear error, not appellate *de novo* review. Rule 52(a), Fed. R. Civ. P.; *Anderson v. City of Bessemer*, 470 U.S. 564, 573-76 (1985).

1. In *Amchem*, this Court noted the wide variety of factual and legal questions presented by the class members' individual personal injury claims, and it accordingly held that the class action settlement failed to satisfy the requirement of Rule 23(b)(3) that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." 117 S. Ct. at 2249-50. In analyzing that issue, the Court stated that the common questions required by both Rule 23(a)(2) and Rule 23(b)(3) for class certification may not be established solely by reference to the class members' common interests in obtaining a settlement determined to be fair under Rule 23(e). Rather those questions, as well as the requirement of Rule 23(a)(3) that the claims of the class representatives be typical of those of the class, must be identified and evaluated by reference to "the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement." *Id.* at 2249.

In an effort to make this case resemble *Amchem*, petitioners assert that the Fifth Circuit "refused to assess class certification in terms of the legal or factual questions in the complaint . . . and instead purported to find Rule 23(a) commonality and typicality in the class members' supposed 'common interest' in seeking 'equitable distribution of compensation' under the settlement." Pet. 12-13. This contention grossly mischaracterizes what the Fifth Circuit did.

As both courts below recognized, the principal controversy resolved by the Global Settlement was whether class members would or would not be entitled to receive compensation for their existing or future personal injury claims against Fibreboard out of the only assets available to pay such claims — the insurance policies of Continental and Pacific. App. 58a, 276a. The availability of insurance coverage under those policies was already being litigated both

in the coverage case by Fibreboard and the insurers (App. 266a-276a) and in the *Andrus* case by some individual plaintiffs, Fibreboard and Continental (289a-290a, 379a-380a).

Those insurance disputes, which long preexisted this settlement, presented a tremendous risk to all class members and could only be resolved on a class-wide basis. The class's unitary need for a favorable resolution of the insurance disputes was pled in the complaint and, if necessary, could have been litigated by the class to judgment in an action against the insurers and Fibreboard. *See* pages 27-29, *infra*. The legal and factual questions presented by the insurance disputes thus "preexist[ed] any settlement" and "qualif[ied] each class member's case as a genuine controversy" (*Amchem*, 117 S. Ct. at 2249). All of these questions were common to the class, the class representatives' claims with respect thereto were typical of the class, and resolution of those questions was the primary accomplishment of the Global Settlement. App. 357a-358a, 415a.

It was by reference to *these* legal and factual disputes that the Fifth Circuit determined satisfaction of the "commonality" and "typicality" requirements of Rule 23(a), precisely as *Amchem* mandates. In its initial opinion, the Fifth Circuit repeatedly referred to the class members' common interest in eliminating the risk posed by the insurance coverage litigation in holding that the commonality and typicality requirements of Rule 23(a) were met. App. 56a-58a. Indeed, the court expressly distinguished the Third Circuit's decision in *Amchem* (then known as *Georgine*) on the basis that the instant case involves commonly held questions involving insurance coverage. App. 58a n.8. On remand, the Fifth Circuit referred to its prior opinion in reiterating its conclusion that the Rule 23(a) requirements were satisfied here. App. 2a-3a. There is thus no basis whatsoever for

petitioners' assertion that the Court of Appeals used the settlement itself as the basis for its "commonality" and "typicality" determinations.

2. Petitioners next contend that the Fifth Circuit has refused to follow a supposed *per se* rule of law established by this Court in *Amchem* to the effect that a material conflict always exists between "currently injured" and "exposure-only" members of a single class of mass tort victims. Pet. 13-15. In fact, the conflict identified in *Amchem* did not result from application of any *per se* rule, but from a concrete divergence of interests among the two groups that was created by the particular terms of the *Amchem* settlement. 117 S. Ct. at 2251. The Fifth Circuit correctly held that no similar conflict exists in this case because the factors cited by the Court in *Amchem* as evidencing such a conflict are totally absent here.

The settlement in *Amchem* established "a schedule of payments to compensate class members who meet defined asbestos-exposure and medical requirements." 117 S. Ct. at 2240. The settlement, which was to be administered by the settling defendants themselves, listed four categories of compensable disease and specified the range of compensation payable for each category, without any adjustment for future inflation. The settlement also provided limits on the total number of claims payable for each disease in a given year and provided that specified categories of claims (otherwise cognizable under applicable state law) would receive no compensation at all. Class members were bound to the settlement in perpetuity, whereas defendants could withdraw after ten years. Finally, a few class members per year could opt out of the settlement and pursue their claims in court (although claims for punitive damages or increased risk of cancer were then barred). 117 S. Ct. at 2240-2241.

Since there was no fixed settlement amount to be divided among the class members in *Amchem*, there was no need for an equitable allocation of the settlement. Rather, this Court discerned a conflict between the currently-injured and exposure-only class members because the settlement itself made "essential allocation decisions designed to confine compensation and to limit defendants' liability" in a manner that materially affected the two groups differently. 117 S. Ct. at 2251. In particular, the Court emphasized the absence of an inflation adjustment for the fixed amounts payable for claims far into the future; the stringent limits on the number of class members who could take their individual claims to the tort system if dissatisfied with the settlement amounts offered them (the "back-end opt-outs"); and the total elimination of class members' loss-of-consortium claims for no compensation. 117 S. Ct. at 2251. Notwithstanding the differential impacts of these provisions on the two groups, they were not separately represented in the settlement negotiations. This Court accordingly upheld the Third Circuit's conclusion that neither the terms of the *Amchem* settlement nor the structure of its negotiations provided sufficient assurance that a single set of class representatives had adequately understood and addressed the identified conflicts. *Ibid.*

In assessing whether class members' interests meaningfully conflict, the contrast between *Amchem* and the instant case is stark. First, neither the currently-injured nor the exposure-only class members in *Amchem* faced any insurance coverage or other unitary risk that their claims would not be paid. Here, the members of both groups of the *Ahearn* class shared an identical need to eliminate Fibreboard's insurance coverage risks: absent a favorable resolution of those controversies, the claims of both groups against Fibreboard were equally worthless. App 357a-358a.

This gave the currently-injured and exposure-only class members in *Ahearn* a community of interest that was totally absent in *Amchem*.

Second, the structure and terms of the Global Settlement here include none of the aspects of the *Amchem* settlement on which the Third Circuit and this Court based their findings of a material conflict between currently-injured and exposure-only class members. The TDP does not fix the amounts to be paid for any particular category of class member claims; rather, it permits those amounts to fluctuate in response to developments in the tort system. Moreover, individual class member claims will be paid from a settlement fund that will be invested and grow over time. For both reasons, there is no need here for an inflation-adjustment provision to protect exposure-only class members, in contrast to the situation in *Amchem*. Similarly, the Global Settlement imposes no limits at all on the number of class members who can exercise back-end opt-outs to the tort system if dissatisfied with the settlement trust administrators' evaluation of their individual claims. App. 346a, 584a. Finally, there is in the instant case no set of class member claims, like the loss-of-consortium claims in *Amchem*, that are extinguished by the settlement for no compensation. Instead, subject to certain relatively inconsequential limitations applicable to all class members (discussed below), the claims-processing and distribution scheme established by the TDP allows each class member to resolve his or her claim, through litigation in state or federal court if necessary, for any amount to which the class member can establish entitlement under applicable law, in whatever jurisdiction the claim can properly be brought. App. 346a, 583a-621a.

Third, in sharp contrast to *Amchem*, the limitations on which petitioners base their conflict claim here — the elimination of punitive damages, a $500,000 cap on individual

recoveries, and the absence of pre-and post-judgment interest (Pet. 8, 16) — apply to all class members equally. There is no differential impact on currently-injured and exposure-only class members, as there was in *Amchem*. The limitations seized on by petitioners, moreover, have relatively minor real-world significance in this case, and they are clearly appropriate for ensuring an equitable division of a settlement fund that is not large enough to guarantee full payment over a period of many years for all the claims that class members might potentially assert against it. App. 372a.[6]

Finally, petitioners do not suggest, and there is no record evidence of, any conflict between currently-injured and exposure-only class members concerning the *amount* of the settlement ($1.535 billion). Because the amount was fixed, some equitable mechanism necessarily had to be established for allocating this money among class members. That mechanism was embodied in the TDP, a component of the

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[6] Punitive damages were almost never obtained historically against Fibreboard (App. 261a, 372a-373a) and, in any event, would constitute an unfair windfall to any class member recovering them from a settlement fund such as this whose goal is to allocate the settlement amount to compensate all class members equitably for their personal injuries.

Individual judgments against Fibreboard in excess of $500,000 had been exceedingly rare, and the insurance policies that constituted the only resource for paying claims of this magnitude contained $500,000 per person limits. App. 267a, 373a. Petitioners complain that the $500,000 cap is too low and thus favors exposure-only class members at the expense of the currently-injured (Pet. 16), while Judge Smith suggests that the cap is too high thus hurting exposure-only class members for the benefit of the currently injured (App. 26a). Such a disparity of views hardly supports the existence of a substantial conflict between the two groups on the point.

Finally, the elimination of pre- and post-judgment interest was relatively inconsequential in light of the District Court's unchallenged finding that claims against the settlement trust would likely be resolved and paid more quickly for most class members than in the tort system. App. 373a-374a.

Global Settlement that was negotiated months after the $1.535 billion settlement had been agreed upon in principle and announced publicly. App. 335a-336a, 346a-347a. Thus, even if petitioners were correct in asserting a meaningful conflict among class members as to *allocation* of the settlement amount, that conflict (in contrast to the situation in *Amchem*) would not justify reversing the lower courts' approval of the *overall settlement*. At most, it would justify a remand for the limited purpose of creating subclasses to renegotiate, and litigate if necessary, the detailed provisions of the TDP. *See* App. 148a. This is a wholly fact-bound question that does not warrant this Court's review.

3. Although the recovery limitations contained in the TDP apply equally to members of the currently-injured and the exposure-only groups, and are relatively inconsequential to boot, petitioners complain vociferously that the rights of the currently injured to immediate and full payment for their individual claims are being unfairly restricted. Pet. 13, 16. This is assertedly so because one purpose of those restrictions is to ensure the availability of funds to pay, on a fair and comparable basis, the later-filed claims of exposure-only class members who manifest their compensable injuries in the future. This argument boils down to an assertion that *any* restriction contained in this insurance settlement on the ability of currently injured class members to receive the maximum amount they could have obtained — assuming insurance coverage — in a race to judgment in the tort system created a *per se* conflict with exposure-only class members requiring the creation of separately represented subclasses. There is no basis in law or logic for any such *per se* rule.

Virtually every settlement of a class action is for an amount less than 100% of class members' potential aggregate claims — that is why it is a settlement and not a litigated judgment. And every settlement for less than 100% of such

claims will by definition require an equitable allocation of the settlement amount among the settling class members to ensure parity of treatment. The *per se* rule advocated by petitioners would require the creation of subclasses to negotiate this allocation in every case where one group of class members could plausibly contend that, absent a class settlement and any requirement for an equitable allocation thereof, they could win a race to judgment with another group of class members and thereby demand preferential treatment on their claims out of the settlement fund. This would be true (for example) in the common situation where some class members have individual suits already pending while others, prior to class notice, have not yet filed suit or may be unaware that they even have claims to assert. In making this argument, petitioners ignore both the inequity of the result they seek and the absence of any legal basis for their claim for preferential treatment.[7]

That this Court in *Amchem* intended to establish no general rule requiring subclassing whenever one group of class members has a superior shot at winning a race to judgment is demonstrated by the Court's favorable citation of the Manville Trust case, *In re Joint Eastern and Southern*

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[7] In any Rule 23(b)(1)(B) case where the limited fund pre-existed the settlement, petitioners' theory would require subclasses from the beginning for each and every group or individual within the class who could plausibly claim an ability to recover in full on his claim prior to exhaustion of the fund. The number of subclasses that could be sought in a limited fund tort case would be limited only by the imagination of the lawyers involved. For example, some class members could assert, using statistics, that cases brought in one jurisdiction will go to judgment faster than cases brought in others. Such arguments for subclassing would be totally inconsistent with the fundamental purpose for creating Rule 23(b)(1)(B) and applying it in limited fund cases, *i.e.*, to eliminate the adverse impact on some class members resulting from other class members' winning the race to judgment and exhausting the fund.

Dist. Asbestos Litig., 982 F.2d 721 (2d Cir. 1992), *modified on reh'g sub nom. In re Findley*, 993 F.2d 7 (2d Cir. 1993). *See* 117 S. Ct. at 2251. In that limited fund case, the Second Circuit initially held that subclasses were required for two groups of class members that, as result of the order-of-filing priority (the "FIFO queue") governing processing of claims created by the claims resolution procedures of the now-insolvent Manville Trust, had conflicting interests arising from the first group's ability to be paid in full, thereby exhausting the funds available to pay the second group. 982 F.2d at 741-42.

On rehearing, however, the Second Circuit reversed its decision on this point and held that subclasses were not required for the two groups because, correctly interpreted, the Trust documents did not establish a payment priority that "created legally enforceable rights." 993 F.2d at 10. In the absence of such legal entitlement, the mere fact that the group of class members at the head of the FIFO processing queue would as a practical matter have occupied a favored position vis-a-vis the remaining class members was not sufficient, according to the Second Circuit, to require subclasses for the two groups. 993 F.2d 10-11. Here, petitioners can show no legally enforceable right for preference to be given to the claims of the "few class members who had already developed an asbestos-related disease" (Pet. 5) over the claims of the exposure-only class members. Despite petitioners' suggestions to the contrary (Pet. 15, 17), neither the Rules Enabling Act, 28 U.S.C. § 2072, nor the Rules of Decision Act, 28 U.S.C.

§ 1652, even purports to create substantive legal rights governing the entitlement of tort plaintiffs to recover on their claims in any particular order of priority.[8]

4. Although this issue is not included in petitioners' Questions Presented and the argument with respect to it is buried in a footnote (Pet. 14 n.7), respondents feel obligated to address petitioners' wholly unwarranted, but incendiary, contention that class counsel had a conflict of interest arising out of the prior settlement of individual cases. Petitioners base this contention on the assertions that (i) class counsel were "simultaneously" negotiating the class action and the separate settlement of their individual clients' cases (Pet. 14 n.7), (ii) those individual settlements were "for higher-than-average amounts" (Pet. 8), and (iii) those individual settlements were "*contingent on the approval of a global settlement - on any terms - of all future claims against*

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[8] There is no merit to petitioners' footnote assertion (Pet. 14 n.7) of a conflict between pre-1959 and post-1959 class members. The uninsured status of post-1959 class members had been eliminated long before the TDP was negotiated by three separate events. First, as a result of the Pacific agreement, by the end of 1992 Fibreboard had up to $330 million of insurance available to pay post-1959 claims. App. 284a-285a. Second, in the April 9 Agreement Continental agreed to fund any global settlement that it and Fibreboard could negotiate with Fibreboard's asbestos personal injury claimants without regard to whether such claimants had pre-1959 or post-1959 claims. App. 308a-310a. Third, the back-up Trilateral Agreement entered into between Fibreboard, Continental and Pacific on October 12, 1993, provided a fund that Fibreboard could use to pay both pre-1959 and post-1959 claims without distinction. App. 334a-335a, 354a-355a. Thus, when the settling parties negotiated the TDP after October 12, 1993, there was no basis on which anyone purporting to represent pre-1959 class members could have reasonably contended that pre-1959 class members should receive higher payments for equivalent claims than post-1959 claimants. The dissent's assertion to the contrary below (App. 415a-418a) has absolutely no support in the record.

Fibreboard" (Pet. 8, emphasis in original). Each of these assertions is either incorrect or misleading.

First, at the suggestion of Circuit Judge Higginbotham, acting as a mediator, the parties deferred negotiation of the Global Settlement until after Fibreboard, Continental and the Ness Motley firm had negotiated and Judge Parker had approved the modified Ness Motley settlement on August 9, 1993, which was the only settlement whose negotiations overlapped any of the three-party global negotiations earlier in 1993. App. 316a-319a. Several of class counsel — Messrs. Kazan and Wartnick and the firm of Caplin & Drysdale — were not involved in the Ness Motley settlement and thus could have no conflict of interest arising from its negotiation in any event. App. 312a-319a.

Second, the Ness Motley settlement was not "contingent on approval of a global settlement . . . of all future claims" (Pet. 8). Rather, 50% of the settlement amount was paid in cash and payment of the remaining 50% was conditioned upon the occurrence of any of *three* separate events — a Fibreboard win in the coverage case, a settlement of the insurance disputes between Fibreboard and Continental (as in fact occurred in the back-up Trilateral Agreement), or a global settlement among Fibreboard, Continental and a class of asbestos claimants. Tr. 1128; Fib. Trial Exs. 586, 909a. As the District Court found, every experienced asbestos plaintiffs' lawyer in the country had negotiated settlements under Fibreboard's partial payment and assignment settlement programs whereby payment was contingent on a favorable resolution of Fibreboard's insurance disputes. Thus, particularly given the time pressure created by the impending appellate decision in the coverage case, there was no way the class could obtain competent counsel not subject to the same supposed "conflict". App. 401a-404a. Moreover, the fairness of any global settlement would inevitably be subject to

searching scrutiny by other plaintiffs' counsel and by the courts. Class counsel's presumed desire to facilitate payment of the remaining 50% of their previously settled claims would thus have to include a motivation to negotiate a global settlement that was demonstrably fair to the class for which it was negotiated. App. 405a-407a. Neither petitioners' counsel nor anyone else has ever seriously contended that the amount of the Global Settlement was unfair.

Finally, petitioners' implication that class counsel were induced to sell out the class because some of those counsel — the Ness Motley representatives — had settled their existing cases at "higher than average amounts" (Pet. 8) is flatly contradicted by the record. The District Court explicitly found that (i) the settlement amounts in the modified Ness Motley agreement in 1993 were *lower* than those in the initial Ness Motley agreement in 1992 and (ii) the settlement amounts in the modified Ness Motley agreement were used by class counsel to negotiate a *higher* Global Settlement amount. App. 319a, 407a.

II. CERTIFICATION OF A RULE 23(b)(1)(B) CLASS IN THIS CASE CREATES NO CONFLICT WITH ANY DECISION OF THIS COURT OR ANY COURT OF APPEALS AND WAS PERFECTLY APPROPRIATE

1. Notwithstanding the complete absence of any contrary authority, whether from this Court or other circuits, petitioners seek review of the Fifth Circuit's affirmance of the District Court's class certification of this case under Rule 23(b)(1)(B). Ignoring the class's unitary interest in resolving the risk to all class members presented by the insurance disputes here, petitioners claim that this case involves an attempt to limit the substantive state law tort claims of class

members by converting them into a pro-rata share in an artificially limited settlement fund. Pet. 15-20.

Petitioners err, however, in asserting that the Rule 23(b)(1)(B) class certification here violates the Rules Enabling Act and the Rules of Decision Act by limiting class members' rights to obtain immediate and full payment of their individual state law claims. Pet. 15-17.

Virtually every class action settlement involving claims for money results in a compromise whereby class members receive less individually than they might have obtained if they successfully litigated their claims to judgment. No sensible argument can be made that application of Rule 23 to certify the class in such circumstances violates the Rules Enabling Act, much less the Rules of Decision Act. Any limitation on class members' "substantive" rights to full recovery on their individual claims results from the *settlement* not from the application of Rule 23.

Petitioners are thus flatly wrong in contending that their "substantive" state law rights (i) to recover more than $500,000 on a single claim, (ii) to recover punitive damages, and (iii) to recover pre- or post-judgment interest are being abridged by the lower courts' application of Rule 23(b)(1)(B). Pet. 16-17. It is the provisions of the TDP — which is a component of the Global Settlement agreement — that effects those limitations, not the purely procedural step of certifying a Rule 23(b)(1)(B) class here.

The real issue is whether the class had any claims that could properly be certified under Rule 23(b)(1)(B) and then, upon appropriate notice and hearing pursuant to Rule 23(e), settled in a manner which resulted in class members receiving less than 100 cents on the dollar for their individual claims. If the class claims may properly be certified under Rule 23(b)(1)(B) and the settlement of those claims is fair and

approved in accordance with the required procedures, no issue is presented under the Rules Enabling Act or the Rules of Decision Act, and petitioners have cited no authority from this Court or any other court to the contrary.

As discussed *supra*, at 1-5, the controversies among the parties that justified the certification of a mandatory class under Rule 23(b)(1)(B) to resolve those controversies had to do with the risk to the class that the insurance disputes between Fibreboard and its insurers would result in Fibreboard being left with no assets out of which to pay class members' claims against it. The principal insurance dispute creating this risk was the coverage case.

In addition, other insurance disputes — for example, whether Fibreboard's assignment settlements could be enforced against Continental or instead were breaches of its obligations under Continental's policy, thereby potentially forfeiting Fibreboard's right to coverage — were already being litigated in individual plaintiffs' actions like *Andrus*. *See* Fib. Trial Ex. 304. In any individual suit that Continental did not or could not settle — such as *Andrus* — there was a risk that a decision in Continental's favor would severely compromise other class members' ability to protect their interests — precisely the risk that Rule 23(b)(1)(B) is intended to foreclose.[9]

The class members' unitary interest in eliminating the risk resulting from the insurance disputes to their interests in being compensated for existing or future injuries caused by their exposure to Fibreboard's asbestos products was properly

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[9] Indeed, as noted earlier, after the Global Settlement was reached, an initial trial court decision upholding Fibreboard's assignment settlement program was reversed by the California Court of Appeals in the *Andrus* case. App. 379a-380a.

recognized by both the District Court and the Fifth Circuit majority as a basis for Rule 23(b)(1)(B) certification of the class in this case. App. 57a-58a, 488a-489a.

Petitioners prefer to characterize the class member interests here as "in personam" personal injury claims that are simply being aggregated for settlement purposes and to insist that the settling parties and the lower courts are attempting to justify Rule 23(b)(1)(B) certification by contending that the fund created by the settlement is a "limited fund." By attempting to confine the issue to the existence *vel non* of a limited fund, petitioners seek to have the propriety of the Rule 23(b)(1)(B) certification here turn on straw-man debates about whether this case is an *in rem* action (Pet. 17) and whether every case involving a settlement creates a "limited fund" because the settlement amount is not open-ended (Pet. 19).

These arguments are red herrings. Respondents are not claiming that the Global Settlement *itself* creates a limited fund that justified Rule 23(b)(1)(B) certification. Nor are respondents arguing that it is permissible simply to aggregate personal injury claims against a solvent or well-insured defendant for settlement purposes under Rule 23(b)(1)(B). What respondents contend, and what the District Court and the Fifth Circuit both held, is that it is consistent with the language and purpose of Rule 23(b)(1)(B), as well as legally and constitutionally permissible, to certify a mandatory class consisting of persons exposed to a defendant's asbestos products who have or will develop injury or death as a result of that exposure for the purpose of resolving a real controversy over disputed insurance coverage for that otherwise hopelessly insolvent defendant that will determine

whether any of the members of that unitary class will be compensated at all by that defendant for their claims.[10]

2. Petitioners attempt to minimize the significance of the insurance disputes by asserting that the Trilateral Settlement has "independently" resolved those disputes and that it "guarantees that Fibreboard will have ample insurance to pay future asbestos claims." Pet. 3-4. To the contrary, Fibreboard agreed to the Trilateral Settlement only at the insistence of class counsel as a condition of and a back-up to a Global Settlement with the class; absent the Global Settlement, there would have been no Trilateral Settlement. App. 329a-330a. Moreover, the Trilateral Settlement does not come into effect unless and until the Global Settlement is finally disapproved by the courts. App. 353a-355a. Thus petitioners' assertion that the Trilateral Settlement was negotiated independently of the Global Settlement is flatly wrong. Furthermore, far from "guaranteeing" ample insurance to pay future claims, the Trilateral Settlement would provide hundreds of millions of net dollars less to the class, and would probably leave Fibreboard without sufficient funds to pay

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[10] Judge Smith grudgingly accepted the proposition that the class had a genuine dispute with the insurers but claimed that that dispute did not justify the class's settlement with Fibreboard for what he termed a "mere" $10 million. App. 118a-119a. What Judge Smith and petitioners (Pet. 5) ignore is that (i) no settlement with Fibreboard's insurers was possible without the consent of Fibreboard, the insured, (ii) Continental had already agreed with Fibreboard in the April 9 Agreement that any Global Settlement would be paid entirely out of insurance, and (iii) Fibreboard would not give its consent unless the class accepted the insurers' payment as part of a complete settlement of the class claims against Fibreboard. App. 374a-376a. As for the $10 million of funds from Fibreboard, the issue for the class was whether the total settlement amount of $1.535 billion was reasonable. As is the case with most settlements with insured defendants, it was a matter of indifference to the class whether that amount came from Fibreboard, its insurers or some combination of them.

those class members whose injuries manifest themselves many years in the future. App. 358a-359a, 361a-367a, 501a-502a.[11]

Petitioners' vociferous attack on the use of a Rule 23(b)(1)(B) mandatory class to resolve the instant insurance disputes is puzzling in light of their acquiescence in substantially the same procedure in the companion *Rudd* case which approved the Trilateral Settlement. As required by the parties' agreement, a class action suit was commenced in *Rudd* in which virtually the same persons who comprise the plaintiff class here were included as a defendant class in an action seeking a declaration that the Trilateral Settlement was fair and reasonable to, and binding upon, the class.[12] *Rudd* was ultimately resolved when the class consented to the relief sought. Although the *Rudd* suit and the instant case raised many of the same issues concerning the propriety of Rule 23(b)(1)(B) certification of a non-opt-out class consisting of exposure-only and currently injured asbestos claimants, those aspects of the *Rudd* case were not challenged by the Ortiz petitioners nor objected to by Judge Smith when such objections were pressed by the Flanagan petitioners, and *Rudd* is now final. *See* Pet. 4 n.4, App. 93a-97a, 109a.

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[11] Petitioners suggest (Pet. 2 n.1) that Fibreboard's 1997 acquisition by another asbestos defendant, Owens-Corning, could "expand enormously" the assets available to pay claims against Fibreboard. This development occurred four years after this case was settled; it is obviously irrelevant in deciding whether the lower courts' decisions based on the factual record as it existed when the settlement was approved were correct. In any event, petitioners nowhere explain how Owens-Corning's purchase of Fibreboard's stock could make Owens-Corning's assets available to satisfy claims against Fibreboard, which remains a wholly separate corporation.

[12] Also included were persons who had filed but not settled or gone to judgment in cases against Fibreboard as of August 23, 1993. *See* page 5, note 4, *supra*.

The enthusiasm of petitioners' counsel for the Trilateral Settlement, notwithstanding its strikingly inferior benefits for the class, is at least partially explicable by their desire for higher attorneys' fees. One of the reasons why the Global Settlement produces far greater net dollars for the class is that it limits the fees chargeable by plaintiffs' counsel for prosecuting claims against the settlement trust to a maximum of 25% of any recoveries. By contrast, fees equal to 33%-40% of the recovery are normally charged by plaintiffs' counsel, including counsel for petitioners, in the tort system. App. 365a.[13]

3. Petitioners contend that, because the motivating force behind the settlement from the perspective of the class was the insolvency of Fibreboard should it lose the insurance disputes, effectuating the settlement outside of bankruptcy is an improper attempt to circumvent the Bankruptcy Code. Pet. 19-21. However, petitioners' "circumvention" argument must be premised on the proposition that application of the Bankruptcy Code was an available and realistic option for the class here — a premise that is demonstrably wrong.

The District Court found that Fibreboard would not file for bankruptcy as long as it had any hope of prevailing on the coverage disputes with the insurers. App. 375a-376a. The members of the *Ahearn* class by definition had not yet filed suit against Fibreboard and thus had no unpaid judgments against it; they could not have sought to put Fibreboard into bankruptcy involuntarily even had they desired to do so. App. 375a. *See* 11 U.S.C. § 303(b)(1); *In re Raymark Industries, Inc.*, Case No. 89-20233T (Bankr. E.D.Pa., Aug. 9, 1996) (as long as asbestos manufacturer continues to

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[13] Indeed, counsel for the Flanagan petitioners made his concern over the reduction in his prospective fees quite explicit at the settlement fairness hearing. *See* Tr. 1296-1301.

dispute its liability and pay judgments as due, asbestos claimants cannot put it into involuntary bankruptcy).

Those persons outside the *Ahearn* class who did have unpaid settlements with Fibreboard had uniformly determined not to seek to put Fibreboard involuntarily into bankruptcy pending the outcome of its insurance disputes because a favorable outcome of those disputes was the only way in which they could hope to be paid over $1.2 billion in settlements then outstanding. App. 277a-279a, 285a-286a, 302a-303a. Having Fibreboard in bankruptcy would not facilitate or improve its chances of prevailing in the coverage case or any of its other insurance disputes; bankruptcy proceedings would merely reduce Fibreboard's value by interfering with its business operations.

Since Fibreboard could lose the insurance disputes whether in or out of bankruptcy, and since the class had no ability or motive to force Fibreboard into bankruptcy until and unless it *lost* the coverage disputes, the only way for the class to protect itself against the risk of that loss was to participate in a negotiated settlement of the insurance disputes with the insurers and Fibreboard. Once that settlement was secured, Fibreboard was no longer faced with insolvency and the class could equitably share in the settlement fund pursuant to Rule 23(b)(1)(B) and Rule 23(e). Such a resolution is plainly consistent with the Bankruptcy Code, which permits the dismissal or suspension of pending bankruptcy cases where an arrangement is worked out among the debtor and its creditors outside of bankruptcy court. *See* 11 U.S.C. § 305(a).

III. THE CLASS ACTION CLAIMS SETTLED HERE AROSE FROM A JUSTICIABLE CONTROVERSY

As an adjunct to their efforts to ignore and avoid the insurance disputes that formed the motivation for and basis of

the settlement challenged here, petitioners claim that this class action does not present a justiciable controversy under Article III of the Constitution because "the negotiations [of the settlement] did not involve the resolution of *existing* legal claims for *actual* injuries, but the establishment of an elaborate alternative dispute resolution scheme to take control of any and all *future* asbestos claims against Fibreboard." Pet. 26.[14]

Petitioners base their contention that the settlement here affects primarily class members who "have no injuries and no ripe legal claims" (Pet. 25) on their insistence that (i) the only claims of injury asserted in the complaint on behalf of the "exposure-only" majority of class members were for fear of cancer, enhanced risk of developing cancer and medical monitoring, (ii) those claims neither could nor were intended to be actually litigated, and (iii) the settlement provided no specific redress for those claims. Pet. 27.

Petitioners appear to read this Court's decision in *Amchem* to have adopted the Third Circuit's holding below, *Georgine v. Amchem Products, Inc.*, 83 F.2d 610, 625 (3d Cir. 1996), that a class action cannot be certified under Rule 23 if it asserts claims that cannot be litigated to judgment in the absence of a settlement and, based on that reading, argue that the class settlement here was improperly approved because the complaint that commenced this action similarly

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[14] Petitioners are clearly wrong in characterizing this settlement as creating a compelled alternative dispute resolution system that deprives them of their day in court. The settlement offer negotiation process established by the TDP, including non-binding mediation and arbitration, is ultimately consensual because if, in the prosecution of an individual claim, a class member is dissatisfied with the results of that process, he or she has an absolute right to sue the trust in the tort system. App. 585a-598a.

asserted no claim that could have been litigated in the absence of a settlement.

This approach stands the issues discussed in *Amchem* on their heads. At most, the question is not whether the parties have settled the issues they pleaded but, rather, whether they could have litigated the issues they settled.[15]

Notwithstanding petitioners' tortured logic, this case plainly involves a justiciable controversy. As described above, the representative plaintiffs and all class members here had a strong and unitary interest in the outcome of an existing coverage dispute. That interest was pleaded in the complaint (App. 556a-559a) and class members had standing to litigate that interest under California law,[16] as well as under the Declaratory Judgment Act, 28 U.S.C. § 2201.[17] Indeed, they could properly have litigated that interest in a Rule 23(b)(1)(B) class action since the piecemeal prosecution of

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[15] Even this proposition may overstate the question in light of the decision in *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873 (1996), where this Court upheld a class action settlement that resolved claims that were not pleaded and, for jurisdictional reasons, could not have been litigated in the action that was settled.

[16] California law, which would govern under Texas conflicts of law rules, *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984), permits third-party plaintiffs to obtain declaratory relief against a defendant's insurer before judgment on a coverage question to determine the existence and scope of coverage. *See Omaha Indem. Co. v. Superior Court*, 258 Cal. Rptr. 66 (Cal. App. 1989); *General Ins. Co. of America v. Whitmore*, 45 Cal. Rptr. 556 (Cal. App. 1965). *See also Horace Mann Ins. Co. v. Barbara B.*, 846 P.2d 792, 795 (Cal. 1993). *Compare Shapiro v. Republic Indem. Co.*, 52 Cal. 2d 341, 437 P.2d 289 (1959).

[17] *See Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941); *Cincinnati Ins. Co. v. Holbrook*, 867 F.2d 1330, 1332-33 (11th Cir. 1989); *Farmers Alliance Mut. Ins. Co. v. Jones*, 570 F.2d 1384, 1386 (10th Cir. 1978).

separate actions by individual class members over the coverage issues would as a practical matter be dispositive of the interests of the remaining class members — the very predicate of a Rule 23(b)(1)(B) case. Moreover, as a suit seeking declaratory relief, such an action could also have proceeded as a mandatory, non-opt-out class action under Rule 23(b)(2).[18] Such a declaratory judgment action could have been settled among the plaintiffs, Fibreboard and Continental just as happened here.

Thus, if the Court were to grant review on the "justiciability" issue framed by petitioners, the only question would be whether or not to deem the pleadings amended to conform to the matters raised and the evidence adduced at the fairness hearings, pursuant to 28 U.S.C. § 1653 and Rule 15(b) of the Federal Rules of Civil Procedure.[19] That question hardly merits review. *Compare Chandler v. Miller*, 117 S. Ct. 1295, 1300 n.2 (1997). Petitioners' other arguments that this case does not satisfy Article III requirements, together with their arguments that due process

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[18] That rule provides for mandatory class actions where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).

[19] Appellate courts permit pleading amendments on appeal where necessary to affirm a trial court judgment. *See* 28 U.S.C. § 1653; 6A C. Wright, A. Miller & M. Kane, Federal Practice & Procedure: Civil 2d § 1494 (1990). Indeed, both this Court and courts of appeal have deemed pleadings "constructively amended" to conform them to the proof and decision below without requiring a formal motion to amend from the plaintiff. *See, e.g., Chandler v. Miller*, 117 S. Ct. 1295, 1300 n.2 (1997); *Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384, 388-89 (5th Cir. 1984); *City of Green Cove Springs v. Donaldson*, 348 F.2d 197, 201-02 (5th Cir. 1965).

requires opt-out rights here and that adequate notice could not be given to the class, are fully addressed in the opposition briefs being filed concurrently by respondents Continental and Pacific and respondent Fibreboard.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

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In The

Supreme Court of the United States

October Term, 1997

ESTEBAN ORTIZ, *et al.*,

Petitioners,

vs.

FIBREBOARD CORPORATION, *et al.*,

Respondents.

On Petition for Writ Of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT FIBREBOARD CORPORATION

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CORPORATE DISCLOSURE

Respondent Fibreboard Corporation is a corporation. Its parent company is Owens Corning. It has no nonwholly owned subsidiaries.

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APPENDIX

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Fibreboard Corporation submits this opposition to the Petition for Writ of Certiorari filed by Ortiz, *et al.*

PRELIMINARY STATEMENT

The fundamental problem with the petition is that it does not present questions for review "in relation to the circumstances of the case," in the words of Rule 14.1(a) of this Court.

A. The Case Presented By The Petition

According to the petition, this is the case. There was a "mere *possibility* that Fibreboard might *someday* become insolvent" because of asbestos claims. (Petition 9). Fibreboard's insurers, CNA and Pacific, "disputed coverage for Fibreboard's asbestos liabilities," but "their potential exposure was unlimited," and in 1996 the California courts "resolved the bulk of the contested coverage issues in favor of Fibreboard." (Petition 2). In addition, the same day the parties announced the proposed Global Settlement, "the insurers and Fibreboard independently agreed to resolve their insurance coverage dispute with respect to *all* claims." (Petition 3-4). This independent "Trilateral Agreement guarantees that Fibreboard will have ample insurance coverage with which to pay future asbestos claims." (Petition 4).

Petitioners tell the Court that Fibreboard, pursuing its "corporate goal," "solicited several cooperative plaintiffs' lawyers to arrange a Global Settlement of the future asbestos liabilities." (Petition 26). The asbestos claimants possessed "only personal injury damages claims." (Petition 23). The "state law rights" of each member of the class of claimants "are independent of every other's." (Petition 18). The settling parties and the district court "tried to shoehorn these *in personam* damages claims into a Rule 23(b)(1)(B) class," because the possibility of mass opt-outs "would have spoiled the insurers' and Fibreboard's attempts to rid themselves of all future asbestos liability." (Petition 17). They did this through a "limited fund," but it is "limited solely by the negotiating postures of Fibreboard and its insurers." (Petition 18). The Fifth Circuit held the "theoretical risk of future insolvency" made this a "claim for equitable allocation of a self-imposed limited fund." (Petition 9).

This Court, therefore, must take the case to clarify that courts cannot alter substantive rights

> simply by asserting a contrived "limited fund" — a fund limited only by what the defendant, solvent but fearing a future risk of insolvency, is willing to pay now to resolve its entire future stream of tort liabilities.

(Petition 2).

The reader is left wondering how the lower courts erred so badly. They did not. The petition attempts to depict this case as a mass tort defendant simply avoiding a possible insolvency at some time off in the future through a mandatory class action resting solely on a fund limited only by what it and its cooperating insurers are content to pay. In so doing, it badly distorts and ignores the record, as did the dissenting judge below upon whose mischaracterizations the petition so heavily relies. Proper attention to the extensive fact-bound record would show that this case does not deserve review. In the words of one of petitioners' counsel, Mr. Baron, "Fibreboard presented such a unique fact pattern that I do not believe it will ever arise again." (Business Insurance, August 5, 1996 at 38).

B. The Case Proven By The Record

According to the record, this is the case. Fibreboard without asbestos liabilities was worth at most $235 million. It claimed that it had two remaining insurance policies, spanning a total of 34 months in 1956-1959. Its asbestos-related liabilities arose from exposures dating back into the 1930's. Both remaining insurers, Continental and Pacific, denied coverage for claims where exposure to asbestos took place outside their policy years and illness was diagnosed decades later. No one could even find the Pacific policy. Pacific contested that the policy ever existed, and claimed that if it did, it carried a $1 million aggregate limit. While Fibreboard prevailed at the trial court, the insurers pressed on appeal serious and substantial issues that could destroy coverage. Unpaid Fibreboard asbestos settlement debts by 1993 amounted to $1.2 billion, enough to wipe out Fibreboard five times over.

A series of disputes ensued which were related to but separate from the coverage litigation. One of them pitted Fibreboard against Continental as to Fibreboard's asbestos settlements, done without Continental's consent, using assignments of proceeds to Continental's policy. In another, Continental was aligned against Pacific and Fibreboard arising from the effort by the latter two parties to rescind the Pacific policy in return for money to pay uninsured claims, that is, claims where first exposure to asbestos occurred after 1959. Pacific's obligations to pay depended both on results of the coverage case, and the obtaining of an order protecting Pacific from contribution claims by Continental. Both of those disputes were in litigation in 1993. A third arose from Fibreboard's attempt to accomplish a massive global settlement over Continental's objection using assignments to proceeds of its contested policy.

An April 9, 1993 Agreement between Continental and Fibreboard, reached under pressure of burgeoning assignment settlements to which Continental was exposed, litigation to protect Pacific from Continental, and negotiations for a potential global settlement over Continental's objection, obliged Continental and Fibreboard to use best efforts to achieve a global deal which would cover both insured claims, and claims that neither policy insured, solely with insurance money.

The claimants possessed not only interests in their present and future personal injury claims, but also interests in the Fibreboard policies. The class parlayed those dual interests, the benefits of the April 9 Agreement, and the impending final arguments in the coverage litigation before the California Court of Appeal, into a global settlement that capitalized on the claimants' interests in the policies, settled the coverage litigation, took $1.5 billion of the insurance money (the rest going to pay prior settlements and pending claims), and devoted it to the class.

One does not settle an insurance coverage case such as this piecemeal. The insurers paid an enormous amount of cash to buy out their policies and the contested obligations under them. Just as happened with the Trilateral Settlement, which petitioners applaud, the global settlement protected the insurers from further

claims under these policies. Fibreboard, being asked to turn over to the class the entirety of its remaining insurance, insisted that the proceeds of that insurance protect it as well.

The case assuredly is not like *Amchem Products*. It is not, as petitioners claim, tort reform by judicial fiat. It does not furnish any road map for other defendants faced with mass tort or other claims. The record here does not support petitioners' characterizations of the case, and hence does not supply any basis for the multiple-part question petitioners say is presented.

Finally, petitioners point to the Trilateral Agreement insurance settlement which they assert was reached independently and which itself removed the coverage case risk. But the insurance settlement was not reached independently at all, it was entered into purely in connection with and as a backup to the global settlement, after all earlier efforts to achieve a separate insurance settlement had failed miserably. The parties simply did not have any insurance settlement when they reached the global settlement agreement. And the insurance settlement was confirmed through a mandatory class action consisting of the same *Ahearn* class members involving the same interests in the same insurance policies, all of which petitioners embraced, as was the global settlement, which they here challenge.

This case presents no issue warranting review by this Court.

STATEMENT OF THE CASE

A. The Only Potential Source of Recovery for the Class, Fibreboard's Insurance, Was Subject To a Significant Risk of Total Loss.

From 1920 to 1971, Fibreboard manufactured asbestos-containing products as a diversification from its primary business, which was timber. (App. 38a, 260a). This product line placed Fibreboard squarely in the middle of asbestos products liability litigation. It has been there since the start. *See, e.g., Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

Fibreboard always was of modest size. In 1995, its net worth, assuming no asbestos liabilities, was at most $235 million. (App. 277a).[1] In earlier years, when Fibreboard was trying to confirm insurance for its escalating asbestos liabilities, the market valued Fibreboard at as little as $10 million. (App. 277a).

Given its limited assets, Fibreboard needed insurance coverage in order to defend and pay asbestos personal injury claims. Fibreboard and other companies with asbestos liabilities litigated coverage for these claims against dozens of insurance companies in a California state court. This coverage litigation was "one of the largest and most complex in the history of American civil jurisprudence, . . .". (App. 267a). It began in 1979 and, after massive pretrial discovery and a multi-phased trial, ended with a trial court judgment entered in January 1990. (App. 267a-269a).

In 1985, Fibreboard entered into the multi defendant and insurer Asbestos Claims Facility ("ACF") and in doing so, settled with a number of its insurers. (App. 262a-265a). In 1988, Fibreboard's relationship with the ACF ended. Fibreboard then found itself sued by increasing numbers of asbestos claimants,[2] yet, its participation in the ACF had exhausted all but two of its insurance policies.[3]

Those two policies are at the crux of this case. Both were heavily involved in the California state court coverage litigation. First, although it was unable to locate a copy of the policy, Fibreboard contended that Pacific Indemnity Co. had issued a primary liability policy to Fibreboard for one year spanning 1956 to 1957 and that this policy had no aggregate limit on the total amount payable for product claims. Pacific denied issuing the policy and refused coverage. (App. 266a). Second, Continental Casualty Company had issued a primary policy to Fibreboard

1. Citations to the Ortiz petitioners' Appendix are "App. __." Fibreboard's Appendix is cited "FA __."

2. Indeed, Fibreboard's participation in the ACF had, if anything, increased the rate at which Fibreboard was sued as a defendant by claimants. (App. 265a).

3. The only other insurance funds consisted of approximately $100 million remaining from settlements with two excess insurers with whom Fibreboard had settled separately from the ACF settlement. (App. 266a).

that remained in force for twenty-two months, ending on March 15, 1959. Fibreboard did have this policy and, while it had a $1 million "per occurrence" limit and a $500,000 "per claim" limit, the policy did not contain any aggregate limit for products claims (App. 266a). Continental denied coverage under its policy.

1. The trial court in California ruled that policies spanning less than three years provided extensive coverage for exposures and claims extending over decades.

Many of the asbestos claims against Fibreboard arose out of exposures (*e.g.*, at World War II shipyards) prior to the mid-50's. (App. 260a-262a). Given the long "latency" period for the development of asbestos-related disease, asbestos claims did not start being filed in large numbers until the 1970's and 1980's. (App. 253a). Fibreboard needed to establish that the Pacific and Continental 1956-1959 policies covered these claims, even though the exposures may have pre-dated the policies and the diseases were diagnosed and lawsuits were filed many years after the end of the policy periods.

First, however, Fibreboard had to prove up the existence and terms of the Pacific policy. A jury found that Pacific had issued the policy to Fibreboard, and by a minimum 9 to 3 vote determined that the policy had no aggregate limit on the amount of dollars it would pay. (App. 268a).

On the common coverage issues, the trial court in 1987 ruled that there was coverage under every policy between the time of an asbestos claimant's initial exposure and the time suit was filed, *i.e.*, that each of these policies was "triggered" with respect to the claim. (App. 268a). *See Armstrong World Industries v. Aetna Casualty & Surety Co.*, 45 Cal. App. 4th 1, 43-45, 52 Cal. Rptr. 2d 690, 702-03 (1996). The trial court also ruled, on the "scope" issue, that every triggered policy had a full, independent obligation to pay for all of the costs of defense and indemnity on a claim, up to the amount of the policy limit, even though the policy was only in force for a portion of the total period of time that elapsed between the plaintiff's first inhalation of asbestos and suit. (App. 268a-269a).

Finally, in 1988, the trial court rejected an argument by Continental that under the "occurrence" definition in its policy, all of the asbestos claims constituted just two "occurrences" (corresponding to the two Fibreboard plants which were the source of asbestos-containing products), and hence its total liability under its policy was $2 million. The trial court found, instead, that each individual asbestos claim constituted a separate "occurrence". (App. 269a).

These rulings, in combination, exposed Continental and Pacific to enormous potential liability. They also gave Fibreboard a chance to survive the relentless asbestos litigation. For plaintiffs who inhaled asbestos at any time before the Continental policy lapsed, March 15, 1959 (such claims were called "pre-1959 claims"), Fibreboard could look for coverage under at least one of the Continental and Pacific policies, and those policies never could be exhausted.

2. The insurers appealed raising substantial issues.

Continental and Pacific appealed from the trial court's January 1990 judgment. For the insurance to provide any substantial source of recovery, it was critically important to sustain *all* of the court's rulings. Reversal of either the trigger or scope ruling would virtually destroy coverage. A reversal of the jury's no-aggregate limit verdict on the Pacific policy would leave Fibreboard with only a minimum amount payable under a 1992 settlement with Pacific, described at p. 11, *post*. A reversal on the trial court's decision on the "occurrence" definition would leave Fibreboard with only $2 million of coverage under the Continental policy.

On the trigger issue, some appellate courts had found coverage only under policies in effect during the time a claimant was exposed to asbestos.[4] Others had limited coverage to the policy in effect

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4. *E.g., Ins. Co. of North America v. Forty-Eight insulations*, 633 F.2d 1212, 1218-1220 (6th Cir. 1980), *clarified*, 657 F.2d 814, *cert. denied*, 454 U.S. 1109 (1981).

when the injury resulted in a manifest asbestos disease[5]. Thus, for example, if a plaintiff working in a World War II shipyard inhaled asbestos, went to college after the war and took a white-collar job thereafter, never to encounter asbestos again, and then became sick in 1985, the Continental and Pacific policies would not cover such a claim under either theory because there was no exposure and no manifest disease during the years 1956 to 1959. By contrast, under the California trial court judgment, the Continental and Pacific policies both provided coverage.

Rulings on the scope issue had differed too. Some courts had found that where multiple policies are triggered for a claim, each policy is required to pay only a pro rata portion of the costs of the claim. *E.g., Ins. Co. of North America v. 48 Insulations, supra.* Some of these courts also required the insured to pay a pro rata portion of the costs for periods of no insurance or exhausted insurance. *Id.* Under either theory, most of the coverage would disappear.

The district court in this case expressly found, based upon expert testimony of Marcus Kaufman (former justice of the California Supreme Court) and George Priest (Professor of Law at Yale) that there was a significant risk that Fibreboard would lose one or more of the critical issues on appeal. (App. 275a). There was no margin for error. Any loss, on any issue, would be a disaster, both for Fibreboard and for the asbestos claimants. In the summer of 1993, the California appellate court held arguments on the appeal of the Coverage Case, with the last of them scheduled for August 27. (App. 270a). At that argument, the Court announced that it expected to issue its opinion soon thereafter. (App. 270a).

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5. *E.g., Eagle-Picher Industries, Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 25 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983).

B. Fibreboard Proposed and Claimants Accepted Settlements That Looked To The Insurance Assets For Payment, But Most of Them Created More Disputes With Continental.

As it left the ACF in 1988, Fibreboard lacked the cash needed to pay the ever-escalating liabilities presented by claimants in the asbestos litigation, but it recently had gained favorable coverage rulings in the trial court. Accordingly, Fibreboard developed the "Structured Settlement Program," or "SSP." Fibreboard agreed to settle cases with claimants by deferring immediate cash payments on anywhere from 60 to 100 percent of the amount of the settlement, pending the outcome of the coverage litigation. These settlements contained restrictions on Fibreboard's corporate activities, to ensure plaintiffs that if Fibreboard lost the coverage litigation they would at least have the company as a recourse. (App. 277a-279a). The SSP found acceptance among plaintiffs, although settlement values increased, given the risk of non-payment. (App. 279a).

The plaintiffs' asbestos bar understood that the only hope for significant payments from Fibreboard depended on victory in the coverage litigation. Indeed, plaintiffs' counsel in the asbestos personal injury cases kept themselves well informed of developments in the state insurance coverage appeal. (App. 298a; FA 27a-28a; Tr. 643-644, 903). Steven Kazan, a prominent California asbestos lawyer, was optimistic about Fibreboard's prospects in the Court of Appeal, but privately was "scared to death" about the chances in the California Supreme Court. (FA 29a; Tr. 911-912).

However, the SSP proved unworkable for the settlement of large groups of cases. (App. 281a). Fibreboard found itself in consolidated trials in Texas, West Virginia, Baltimore, and New York, and ran out of defense money because its defense costs exceeded the amounts provided for in a 1988 interim agreement with Continental and Continental refused to pay more. (App. 281a-282a). Consequently, in early 1991, Fibreboard started settling claims by paying no money, but agreeing upon dollar values on the claims. For pre-1959 claims, Fibreboard then assigned to the

settling plaintiff a right to a share of the proceeds from any recovery under the Continental policy; for post-1959 claims (where first exposure to asbestos was after March 15, 1959), settling plaintiffs continued to receive SSP's. (App. 285a). Again, Fibreboard agreed to keep the company intact as a recourse in the event it lost its insurance coverage. (App. 286a).[6]

Assignment settlements were for substantially larger amounts than the SSP settlements ($11,400 average v. $5,400 average). This occurred not just because any payment was subject to the risk of an unfavorable outcome in the state insurance litigation appeal. In addition, Continental vehemently objected to the assignments, contending that they were invalid and vitiated coverage by breaching cooperation clauses in the Continental policy. (App. 286a). Considerable litigation between Fibreboard and Continental ensued over the validity of these assignments. (App. 287a-291a). The assignment settlements were particularly "unfriendly" to Continental, as Continental was faced with the prospect of eventually having to pay for a large number of settlements at ever escalating values which Continental had no say in negotiating. (FA 20a-21a, 30a; Tr. 231-232; 1325-26). By January 1993, the individual assignment settlements totaled almost $1 billion, including a $260 million settlement of 20,000 cases with the Ness, Motley law firm. (App. 302a-303a).

C. Pacific Indemnity and Fibreboard Converted Pacific's Contested Policy Into a Finite But Contingent Asset to Pay Uninsured Claims, Leaving Continental With A Major Risk.

As noted, under the trial court's coverage case rulings, either the Continental or the Pacific policy, or both, covered claims as to which the first exposure to asbestos occurred before expiration of Continental's policy. Those rulings made the coverage under the Pacific policy duplicative of that under the Continental policy. The Pacific policy would be triggered by any claim involving exposure to asbestos prior to May 1957, and responsible up to its $500,000 per person limit. The same was true of the Continental

6. Of course, since asbestos claimants were unsecured creditors, they would share in Fibreboard assets only after its secured creditors were paid.

policy for any claim involving exposure at any time prior to March 1959.

Neither the Pacific nor the Continental policy covered any claim where first exposure to asbestos occurred after March 15, 1959, the expiration of Continental's policy. These post-1959 claims had to be dealt with. The solution lay in the duplicate coverage provided by the two no-aggregate policies. In 1992, Fibreboard and Pacific reached an agreement to rescind the Pacific policy. In return, Pacific agreed to make funds available for post-1959 claims. The amount payable by Pacific would range from zero to $330 million depending upon appellate rulings in the coverage case. The largest portion of the settlement ($225 million) was also contingent on Fibreboard obtaining a judicial determination that the settlement and related rescission eliminated Continental's right to obtain contribution from Pacific on pre-1959 claims paid by Continental. (App. 284a-285a). Any such judicial decision would leave Continental, under the trial court coverage rulings, with the entire cost of all of Fibreboard's pre-1959, insured, asbestos liabilities up to its $500,000 per claim limit, with no aggregate cap.

D. Embroiled In Conflict And Facing Coverage Case Appellate Arguments, The Insurers Agreed To The Global Settlement With The Class And Fibreboard.

1. Early Global Settlement negotiations had failed.

As early as 1991, Fibreboard began exploring the possibility of negotiating a complete resolution of the asbestos personal injury litigation. It did this, in large part, because of *Linscomb v. Pittsburgh-Corning Corp., et al.*, an action filed in the district court below in July, 1990. *Linscomb* alleged a Rule 23(b)(1)(B) litigation class action on behalf of present and future asbestos claimants against Fibreboard and others. (App. 256a, 292a; Fibreboard Trial Exh. 116). Fibreboard felt if it did not nail down a global settlement, it would be prosecuted in *Linscomb* or some other class action. (FA 24a; Tr. 453-454). Fibreboard commenced negotiations with lawyers from the law firm of Ness, Motley, etc. Any global settlement without Ness, Motley involvement would

not be credible, as even Mr. Baron, counsel for petitioners here, acknowledged. (FA 26a; Tr. 516-517).[7] Steven Kazan and Harry Wartnick, the other lawyers with whom Fibreboard negotiated, were Fibreboard's chief adversaries on the West Coast, were among the most knowledgeable counsel about Fibreboard, and were looked to by other plaintiffs' lawyers for guidance on Fibreboard matters. (App. 293a, 389a). These negotiations excluded Continental, which continued to dispute coverage. (App. 301a). But the global negotiations with these supposedly "cooperative plaintiffs' lawyers" (Petition 26) stalled in late 1991, mainly because of the inability to resolve issues regarding opt-outs and co-defendant contribution and indemnity claims. (App. 300-301a).

2. Under pressure, Continental committed best efforts to accomplish a global settlement covering all claims.

In 1993, the cumulative effect of the events of the past fourteen years resulted in an agreement between Fibreboard and Continental which, in turn, led to the global settlement that is the subject of this case.

In January 1993, Fibreboard sued Continental in the district court below, Judge Robert Parker presiding. (App. 303a). This suit sought to validate the assignment that was a part of the massive Ness, Motley 20,000 case settlement (*ante*, p. 10).[8] If successful, it would bind Continental to all the assignment settlements, past and future. Fibreboard also sought the ruling which was a condition to

7. The Ness, Motley firm: controlled over 50% of the asbestos personal injury cases pending around the country, including those pending against Fibreboard (FA 21a; Tr. 303-304); had been involved in virtually all the major trials against Fibreboard (App. 293a); and was on the *Linscomb* class action steering committee. (App. 256a).

8. Fibreboard had obtained a judgment in 1992 from a California Superior Court in Mr. Kazan's *Andrus* case upholding the assignment mechanism, but Continental took an appeal, so the judgment was not *res judicata* pending final decision. (App. 289a-290a). The California Court of Appeal eventually reversed that judgment, but not until October, 1994, long after the global settlement had been reached. (App. 198a, n.5).

obtaining $225 million of the Pacific settlement —that Continental could not obtain contribution from Pacific, and thus would have to bear the entire costs of Fibreboard's insured asbestos liabilities. (App. 303a; FA 32a; Tr. 1328-29).

Facing the risks of the outcome in the state insurance coverage appeal, the increasing liabilities represented by the assignment settlements, and the litigation before Judge Parker to validate the assignments and to insulate Pacific from any contribution obligation, in April 1993 Continental reached with Fibreboard what was called the April 9 Agreement — a seminal event for all the parties. (Fibreboard Trial Exhibit 908). Fibreboard agreed to stop settling cases by assignment of proceeds of the Continental policy. In return, Continental agreed to use best efforts to achieve a global settlement of *all* Fibreboard's asbestos liabilities, present and future, insured and uninsured, all to be paid for by insurance. (App. 308a-309a). This was a commitment Fibreboard viewed, and believed Continental did too, as a standard to which Continental could be held. (FA 22a; Tr. 310).

3. Global negotiations finally succeeded on the eve of the coverage case appellate argument.

Global settlement negotiations followed the April 9 Agreement, under the auspices of Judge Patrick Higginbotham of the Fifth Circuit, who had also acted as a settlement facilitator with respect to the negotiations resulting in the April 9 Agreement. (App. 304a, 320a). The initial negotiations ended in acrimony, with the "cooperative plaintiffs' lawyers" (Petition 26) walking out and declaring negotiations at an end. (App. 312a). Global negotiations did not resume again in earnest until August, but they were impeded by the refusal of Pacific to participate in a global settlement. (App. 319a-321a, 324a-325a). Finally, over the weekend of August 22, Pacific agreed in negotiations with Continental to contribute to the funding of a global settlement. (App. 325a). Immediately thereafter, Continental made an offer of $1.3 billion, which plaintiffs' counsel rejected. Continental then offered $1.5 billion, viewing the increase as roughly equal to Fibreboard's value, and offering it because plaintiffs' counsel kept demanding Fibreboard's net worth, which was not on the table

due to the April 9 Agreement. (App. 326a-327a). Plaintiffs' counsel rejected that, too, and precipitated a trip to Judge Parker's court in Tyler, Texas, where the parties convened on August 26. (App. 327a-328a). This was Judge Parker's first direct involvement in the global settlement discussions.[9] The parties finally reached agreement on the settlement price of $ 1.535 billion on the morning of August 27, the day of the final argument in the coverage case. (App. 328a-329a).[10]

The global settlement eliminated the risk that class members would have no recovery from Fibreboard, either because Fibreboard lost the state insurance coverage appeal, or Continental was able to invalidate the assignment settlement program and destroy any coverage that otherwise might have existed. The district court found it more probable than not that all class claims will be paid at fair and appropriate values, although payment of some may have to be deferred. (App. 359a). Indeed, petitioners have never challenged the global settlement as too little, or as leaving money on the table. *(See post,* n.11). All claims are channeled to a Trust, controlled by three independent trustees, two of whom the claimants' attorneys select. Each class member's claim will be resolved on its own merits through the Trust procedures. Having settled out their policies, Continental and Pacific are protected from suit. Having given over all of its insurance and the significant

9. The Petition states that Judge Parker "orchestrated the settlement negotiations" (p. 3) citing the panel opinion at pp. 45a-47a. But the panel opinion there refers only to the discussions at which Judge Parker was present on August 26. By then, plaintiffs' counsel already had received a $1.5 billion offer, which they privately had decided was acceptable, but rejected it anyway and held out for more. (App. 327a-328a).

10. The Petition does not claim that the global settlement amount is too little or unfair. It does not contend that class counsel lacked leverage or ability to obtain the optimum settlement for the class. Nor could it. With over 50% of the cases, Ness, Motley had plenty of leverage. These were the lawyers who could have destroyed Fibreboard in *Cimino v. Raymark Industries,* 751 F. Supp. 649 (E.D. Tex. 1990). Kazan and Wartnick were Fibreboard's principal adversaries on the West Coast. And now these counsel were armed with Continental's best efforts commitment in the April 9 Agreement, a matter Fibreboard pressed with a letter of July 9, 1993, which Continental viewed as setting it up for a bad faith claim in the event that global negotiations did not succeed. (FA 34a-35a; Tr. 1397-98, Fibreboard Trial Ex. 583). And these plaintiffs' lawyers had available the high Ness, Motley assignment settlement values and used them to ratchet up the global price. (App. 407a).

fruits of over a decade of contentious litigation, and having gotten the insurers to contribute additional funds to substitute for Fibreboard's net worth, so is Fibreboard.

4. The insurers and Fibreboard agreed to a "backup" insurance settlement, approved by way of a mandatory class action.

On August 27, during the last of the negotiations leading to agreement in principle on the global settlement, plaintiffs' counsel continued their earlier insistence upon a backup insurance settlement between Fibreboard and the insurers, to have in place if the global settlement did not achieve final court approval. (App. 329a-330a). This settlement was not actually reached until September, after another series of intense negotiations. (App. 332a-333a).

This back-up insurance settlement, or Trilateral Agreement, provided for $2.0 billion, but that amount is substantially less beneficial to the class. Funds from the backup settlement must be used not only to pay the claims of class members, but also tens of thousands of unsettled non-class claims pending in courts around the country. (App. 354a-355a). Additionally, the backup settlement did not include any money for defense costs, which can equal or even exceed amounts paid for indemnity in mass tort, personal injury litigation. (App. 362a-363a; FA 24a; Tr. 379-81).

The petition asserts that the Trilateral Agreement, which petitioners support,[11] "guarantees that Fibreboard will have ample

11. The backup settlement, in the view of petitioners' counsel, Mr. Baron, is a "superior settlement," a "great settlement" (FA 17a; Tr. 89), which represents the most the insurers were willing to pay. (Baron Amicus Br., FA 8a). Yet the backup settlement will deliver far less — hundreds of millions of dollars less — to claimants than would the global settlement. (App. 361a-362a). One major difference is that the global settlement caps the contingency fees of plaintiffs' lawyers at 25%, compared to the 33%-40% fees available under the backup. (App. 365a). The same concern about the level of contingency fees prompted many filings prior to the injunction in this case. (FA 25a; Tr. 464-65). The Baron & Budd law firm filed some 4,000 cases on August 27, 1993, claiming that they were "present" cases and, therefore, would not be subject to the 25% cap on fees. (FA 35a; Tr. 1505). Similarly, the district court observed that one of the primary objections of the Jaques law firm, which represents petitioners in number 97-1695, was the 25% limit on attorney contingency fees. (App. 185a, n.2).

insurance coverage with which to pay future asbestos claims." (Petition 4). The record is to the contrary. The district court found, citing testimony and exhibits, that

> there is a significant risk that the Trilateral Agreement (even augmented by Fibreboard's non-insurance assets) would leave a "late-comer" component of the Global Health Claimant Class without compensation. . . .

(App. 359a).

The petition also asserts (pp. 3-4), that the insurers and Fibreboard "independently agreed" to the back-up insurance settlement. That assertion is contrary to the record as well.

As early as 1988, Fibreboard and the insurers talked about a possible coverage settlement; but it was clear that they couldn't agree to one. (FA 18a; Tr. 172-173). In early 1990, before the inflationary "assignment" settlement program was inaugurated, Fibreboard suggested complete policy settlements with both Pacific and Continental, but Continental declined. (App. 282a; FA 19a-20a; Tr. 185). Again, in the summer of 1993, with the global settlement negotiations at impasse, Fibreboard and Continental discussed the possibility of an insurance settlement. They were not even close. (App. 313a-314a).[12] Rather, the backup settlement

12. Meyer Koplow, for Continental, testified that the last meeting "would rank right up there as a candidate for the most difficult meeting that we had. We were not close on price, we were not close on any other terms. . . ." He

> came away with the conclusion not only that it would be a long time before we could put some of the people who had been in the room back in a room together again — given what had taken place that day, but also that there were people on the Fibreboard side who simply would — would never agree to — to the kinds of numbers that Continental might consider paying on a bilateral.

(FA 32a-34a; Tr. 1377-79). He saw "no chance" of achieving a separate insurance settlement. (FA 34a; Tr. 1379-80). Stephen Snyder, Fibreboard's lead counsel, testified "it was very clear that we weren't going to be able to do that sort of deal." (FA 22a-23a; Tr. 316-17).

came about only because plaintiffs' counsel insisted upon it. (App. 329a, 332a). The insurers took the position, and adhered to it, that they would pay no more for the backup settlement than they would for global settlement. Fibreboard insisted that it needed much more money with which to pay defense costs. Finally, Fibreboard agreed to the insurers' position, but only as the price of obtaining the global settlement. (App. 329a-330a; FA 23a; Tr. 335-336). It was to get the global that Fibreboard agreed to Continental's terms; "[o]therwise, no way would [Fibreboard] have entered into that settlement." (FA 26a; Tr. 593-94).

Thus, as a matter of fact in this case, there was no backup insurance settlement reached independently of the global. When the global settlement was initially agreed to, there was no other settlement to fall back on and, therefore, the class faced the risk of getting nothing absent the global settlement.

In order to validate the backup insurance settlement, the insurers brought a mandatory class action, *Continental Casualty Co. v. Rudd,* in the district court below against a class of persons virtually identical to the *Ahearn* global "futures" class. The insurers sought, and obtained, not just a declaration that the insurance settlement was fair and reasonable, as the petitioners say (Petition 4, n.4), but also a judgment discharging the insurers from any obligation under their policies, and an injunction prohibiting class members from asserting claims against the insurers. In stark contrast to their position here, petitioners supported the *Rudd* mandatory class. They filed an amicus brief in the Fifth Circuit acknowledging the merits of the backup settlement, the standing of the class members with respect to it, and the propriety of the mandatory class. (Baron Amicus Br., FA 4a, 11a-12a). The Fifth Circuit affirmed Judge Parker's judgment in *Rudd* in the insurers' favor. (App. 93a-97a).

REASONS FOR DENYING THE WRIT

I. THE PETITION MISCHARACTERIZES THE LEGAL AND ECONOMIC INTERESTS AND RISKS INVOLVED AND DOES NOT PRESENT QUESTIONS IN RELATION TO THE CIRCUMSTANCES OF THIS CASE.

The case that the petition presents to this Court is not the case presented by the record. Petitioners would have the Court take a case where a solvent company faced with a theoretical risk of insolvency someday due to a stream of future asbestos liabilities conceives a plan to foreclose them through a class action. With the connivance of its insurers, cooperative class counsel, and a judge bent on tort reform, they announce that the insurers will pay X dollars, and that is the limit. The X dollars is therefore a "limited fund," all future claimants are forced into a mandatory class with no regard to distinctions among them, all their state law tort rights (which is all they had) are sacrificed for an ADR process, and the tortfeasor and its insurers go on about their business free of all asbestos liabilities. This, petitioners would say, is exactly like *Amchem Prods. v. Windsor*, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997), only worse because no class member can opt out. They say that other malfeasors in corporate America anxiously wait to see if they too can follow this road map.

The record does not support the case put by the petition. The record supports these essential facts, instead.

1. By 1993, when the class action was filed, Fibreboard had incurred a settlement debt of $1.2 billion, and had numerous asbestos cases pending against it, not to mention future ones, as against a net worth (not counting asbestos liabilities or insurance) of $235 million. Absent insurance no class member would recover any money.

2. The insurance asset could be very large, or it could and would be worth nothing to the class if Fibreboard lost its insurance coverage in the coverage case or otherwise.

3. Fibreboard and its insurers had shown that they could not settle separately the coverage dispute.

4. The insurers were under pressure to achieve a global settlement to fulfill Continental's commitments in the April 9 Agreement (itself the product of a unique chain of events likely never to be repeated) and to avoid what may be a disastrous loss on appeal about to be argued.

5. The insurers in these special circumstances offered to settle the coverage case and cash out their policies including over $1.5 billion for the class — a sum no one claims is unfair.

6. The class members held legal, not to mention overwhelmingly important economic, interests in the policies which could either: (a) be realized with an enormous sum turned over to the class; or (b) put totally at risk by decisions in the coverage case.

7. By reason of the foregoing, the case fell within Rule 23(b)(1)(B), and the class could remove the risk common to all and take the property in which all had an interest.

This petition does not present questions in relation to the circumstances of this case. Had petitioners fairly taken account of the unique facts and actual legal interests demonstrated to exist by the record in formulating their questions, the Court could evaluate properly whether the case merits review. But they did not. And the case is fact-bound to an unusual degree. The extent of commonly held legal and economic interests by all class members *and* the opportunity to eliminate the common risks to all of those interests — the circumstances which place this case within Rule 23(b)(1)(B) — are not likely to ever rise again. For these reasons alone, the Court should deny this petition.

II. IMPROPER CHARACTERIZATIONS OF THE CASE CUT ACROSS PETITIONERS' SUBSTANTIVE ARGUMENTS.

The Brief for Continental Casualty Company and Pacific Indemnity Company sets forth in some detail why petitioners' legal arguments fail. Below we briefly describe why much of what petitioners argue on the merits does not comport with the record.

A. Petitioners' Rule 23(a) Contentions Misapprehend The Lower Court Decisions And The Reasons For Them.

Petitioners claim that the lower courts applied a tainted standard, substituting the settlement for Rule 23(a) standards and identifying the common issues by reference to the settlement. (Petition 11-12). The Fifth Circuit actually held that the "district court can and should look at the terms of a settlement," because "settlements and the events leading up to them add a great deal of information" and "will often expose diverging interests or common issues that were not evident or clear from the complaint." (App. 55a-56a). *Amchem Products* agreed: "settlement is relevant to class certification." 117 S. Ct. at 2248. And the district court here wrote that it "approaches the Rule 23(a) prerequisites under the assumption that Rule 23(a)'s requirements are no different in the settlement content than in the litigation context." (App. 224a). Number one on the list of common issues for both the district court and the Fifth Circuit was avoiding the potentially disastrous results of a loss by Fibreboard in the coverage case appeal. (App. 56a, 225a, 415a).

The *Ahearn* class had just as much a common interest in eliminating that risk (and in *Ahearn*, seizing control of the fund thereby created) as did the *Rudd* class. In *Rudd*, these same petitioners urged that the Rule 23(a) requirements were satisfied. (Baron Amicus Br., FA 14a-15a). That same interest *did* preexist any settlement. (Petition 12). And all class members did have a preexisting legal (and extremely important economic) interest in the policies under such cases as *Shapiro v. Republic Indem. Co.*, 52 Cal. 2d 341, 437 P.2d 289 (1959), properly referred to in the complaint. (App. 556a-559a). This is far more and much different than the mere "common interest in a fair compromise" to which petitioners refer. (Petition 13).

The petition also claims conflicts existed within the class between "currently injured" and "exposure-only" claimants just like in *Amchem Products*, (Petition 13-14) and insists on "structural assurance" of fair representation.

As this Court put the question in *Amchem*, the requirements of Rule 23(a) and (b) focus on "whether a proposed class has

sufficient unity so that absent members can fairly be bound by decisions of class representatives" — whether through settlement or trial. (117 S. Ct. at 2248). Any class member, or counsel,[13] could adequately represent the class with respect to the overriding common goal — the elimination of the coverage risks and the consequent establishment of a fund of money for the payment of class claims — an issue in which the class plainly had a unitary interest. Petitioners therefore insist there are conflicts within the class with respect to allocation of the fund which undermine the class's ability to pursue this common goal. Once it is conceded, however, that a class has a right and a unitary interest in pursuing and obtaining the fund, some way must be found to share in it — and that is another reason for the mandatory class. To assert that the inherent need to share the fund equitably among its members precludes the class from acting in concert to achieve its common goal of preserving and obtaining the fund would defeat the very purpose of a *mandatory* class.[14] Unlike *Amchem Products*, this is not a case where the defendant keeps the money and decides how

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13. In a footnote, petitioners say class counsel had a conflict because they simultaneously settled claims for their own clients outside the global settlement. The global settlement did not include any claims already filed in court — those of clients of class counsel or of any other lawyers. At the time Ness, Motley settled claims of its clients, global discussions were in a preliminary, exploratory stage. (App. 65a). Only after the Ness, Motley settlement did counsel reach an agreement on a number of future claims to use as a benchmark in negotiations, Pacific was persuaded to join, plaintiffs' counsel refused to include current claims in the global settlement, and the insurers offered $1.3 billion and then $1.5 billion. (App. 321a-327a). Nor was the Ness, Motley settlement contingent on a global deal, as petitioners claim. (Petition 8). Rather, one-half the settlement was payable on an insurance settlement, the outcome of the coverage case, or a global; the other half was paid up front. (Tr. 1245-1246).

14. Here, petitioners completely misread the import of the Court's statement that, even though *Amchem Products* was not a limited fund case, the settlement reflected "essential allocation decisions" (117 S. Ct. at 2251). Petition at 13-14. Read in context, the Court clearly was referring to the fact that, by their very nature, Rule 23(b)(1)(B) actions involve allocation decisions and this is not so as to a Rule 23(b)(3) class.

it will parcel it out on individual class member claims, with an inherent incentive to minimize the total liabilities paid, and without any effective recourse to the courts for class members. Here, the class has the money and its motive is to distribute the entirety of the fund in a manner that is equitable to the class as a whole.[15]

Of interest on this point is what petitioners do not say. They do not now, and did not at the trial below, argue that the allocation mechanism contained in *Ahearn* is in fact unfair or unreasonable from the standpoint of the class as a whole. Instead, petitioners embrace the Trilateral Agreement as a solution for the class. They say that this settlement, and the effect it has on allocation of the insurance funds among the class, is fair and reasonable — indeed a "great settlement." (FA 17a, Tr. 89). Presumably they do so because it would permit petitioners unlimited access to the insurance fund for their claims and the devil take the hindmost as to the rest of the class. The Trilateral Agreement itself works an allocation because it converts the policies with their $500,000 per claim limits — precisely the same as with the Global Settlement — into a fund subject to raids by current claimants and at the expense of future ones.

The Global Settlement, in contrast, follows fairly closely the result in the tort system, assuming Fibreboard prevailed in the coverage case so there is any money for any claimants.[16] This

15. Petitioners' solution — *i.e.*, a *Rudd*-type settlement — ignores the class's inability to bring about a settlement between Fibreboard and the insurers, as graphically demonstrated by the insurers' and Fibreboard's own failed efforts to reach a settlement. And, as noted below, it champions a result that inequitably favors one portion of the class over another.

16. Once the class obtains the fund it makes no sense to permit punitive damages against a blameless claimant-controlled Trust. And with possibly one exception, Fibreboard never paid punitive damages. (App. 338a). As noted, the $500,000 per claim cap corresponds to the policy per-claim limits, and there have been only about a dozen individual Fibreboard settlements over that figure (App. 339a) out of over 104,000 asbestos claims resolved through 1992 (Fibreboard Trial Exh. 705, p. 41). Unlike the settlement in *Amchem Products*, the Global Settlement does not specify dollar amounts or ranges for recoveries for various diseases, but leaves that up to individual adjudications.

Court in *Amchem Products*, 117 S. Ct. at 2251, noted the ability to look to the terms of the settlement (not just structure of negotiations) to assess adequacy of representation. The petition does not identify a single instance where the settlement terms bespeak inadequate representation.[17] It presents no compelling reason for review to scrutinize compliance with Rule 23(a).

B. The Petitioners' Arguments That A Mandatory Class Is Impermissible Overlooks The Legal And Economic Interests At Stake.

The petition takes a one-dimensional view of the state law rights held by class members, characterizing them repeatedly as *in personam* personal injury claims against Fibreboard. It argues that the only way to alter those rights in order to provide relief for late-arriving claimants is bankruptcy. These arguments do not take account of the other substantive state law rights claimants possessed,[18] and mistake Fibreboard's circumstance with that of a debtor simply facing too many claims with too little money.

1. The petition ignores the preexisting rights in the policies.

California law gave all class members legal interests in any resolution of the insurance coverage dispute between Fibreboard

17. In footnote 7 on page 14, the petition claims that structurally inadequate representation is evident in the way the pre-1959 claimants had to give up their insured claims to benefit others, citing Judge Smith's dissent. (*See also* Petition at 8.) That assumes Fibreboard won the coverage case. It ignores that the Pacific Indemnity policy was rescinded and replaced with an agreement to provide money for uninsured claims. It overlooks that Continental in the April 9 Agreement agreed to try to reach a global settlement of all claims — insured and not — with insurance money. And it forgets that the Trilateral Settlement, which petitioners champion, itself makes the insurance proceeds equally available for uninsured claims.

18. They also overstate the practicalities of the individual tort claims against Fibreboard. The petition argues that a class member who received a final judgment against Fibreboard could collect it in full and no other class member could interfere. (Petition 16). That would be correct *if* there were a Fibreboard left to sue or assets upon which to execute. The point of this entire proceeding was to eliminate the real and significant risk that there would be neither and that all the class members' legal interests in the policies, their only realistic source of recovery, would disappear very soon.

and its insurance carriers. Even petitioners recognize that class members were potential third-party beneficiaries of the insurance policies. (Pet. 4, n.4). And they acknowledged in *Rudd* that these same class members had legal standing with respect to a settlement of the policies. (Baron Amicus Br., FA 11a-12a). California law holds that an injured party (and each class member has been exposed to asbestos for which Fibreboard may be liable) is a third-party beneficiary of the defendant's liability insurance policy, and his or her interest cannot be altered by independent actions of the insurer and insured. Indeed, under the law of California, where Fibreboard was located and subject to suit by all class members, the rights of class members could not be conclusively determined in an action between the insurer and insured to which they were not parties. *See Shapiro v. Republic Indemnity Co.*, 52 Cal. 2d 341, 437 P.2d 289 (1959).[19] Continental, Pacific, and Fibreboard could not settle the insurance controversy and finally determine the class members' rights to the policies unless they bound to that settlement, through litigation in which the members were parties, every claimant with any injury who might one day be able to assert a right against the insurers. Thus, the class had a state law interest, as third-party beneficiaries of the policies, in litigating the terms of any insurance settlement. Consistent with those rules, this Court held, in *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941), that litigation to bind a claimant with respect to insurance coverage issues, and thus affect claims under liability policies, present justiciable cases and controversies cognizable in the federal court.

The petition, therefore, is simply wrong when it claims that class members had no claims against specific property. They did,

19. In *Shapiro*, the insurer through post-accident litigation obtained reformation against the insured of the policy in such a way as to exclude coverage. The reformation judgment, to which the claimant was not a party, could not bind him as to his interest in the policy. The court relied on authorities from New Jersey, Ohio, Idaho, South Carolina, and the Sixth Circuit.

and the property was the insurance.[20] Because class members shared rights in that specific property, the petition is equally wrong when it asserts that the substantive rights of each class member are independent of every others'. (Petition 18). These flaws taint all of petitioners' arguments and justify denial of the Petition.

2. This is not a case for bankruptcy, as the petition claims, but one for Rule 23(b)(1)(B).

As well, the petition points to bankruptcy as the sole available solution and accuses the Fifth Circuit of trying to do a better job and legislating. The Fifth Circuit recognized — and petitioners do not contest — that Fibreboard could not be forced into bankruptcy and would not file for bankruptcy itself, preferring to wait out the coverage case if that was the alternative. (App. 78a-79a). This was not a debtor creeping toward bankruptcy, or as petitioners put it, a situation where "the mounting pressure of asbestos claims might someday have driven Fibreboard into insolvency" (Petition 9, 18), like the debtor in *Keene Corp. v. Fiorelli* (*In re Joint E. & S. Dists. Asbestos Litig.*), 14 F.3d 726 (2d Cir. 1993). This was all or nothing — either Fibreboard stayed healthy for an indeterminable time by winning the coverage appeal, or, after a coverage appeal loss, the lights went out, Fibreboard suddenly disappeared, so did its insurance, and the class members get nothing. The Fifth Circuit understood that and explained why the Global Settlement was driven by the insurance coverage litigation and the risks it posed to all the parties, and, therefore, why this case fits within Rule 23(b)(1)(B). Petitioners ignore it.

C. The Petition's Opt-Out Argument Suffers From Its View That Only Personal Damages Claims Existed.

The petition treats the class here as possessing nothing more than an aggregation of personal injury claims. It argues, too, that

20. Petitioners conceded in *Rudd* what they now attack. In their amicus brief in *Rudd*, petitioners likened the action to resolve the class members' rights to the insurance as being essentially one to "quiet legal title to a fixed asset." (Baron Amicus Br., FA 15a-16a).

the decision below conflicts with those in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. dismissed as improvidently granted*, 511 U.S. 117 (1994) and *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989). (Petition 22-24).

Petitioners claim that the panel majority conceded the first point by stating that the central remedial and legal theory of each of the named plaintiffs is Fibreboard's tort liability for damages. (Petition 23, quoting App. 58a). But they ignore what the Fifth Circuit recognized immediately thereafter:

> Further, the issues that brought the named plaintiffs to settle *Ahearn* are the same issues that the district court found common to the entire class. The named plaintiffs settled *Ahearn* because of their desire to avoid the risks of insurance coverage litigation and to insure that money remains available to pay their claims when they make it through the settlement and/or trial process to final judgment. These same concerns affect each member of the Global Health Claimant Class.

(App. 58a).

As shown in the preceding section, the class members held legal interests in the insurance policies and in seeing that those interests did not go up in smoke through a coverage case loss.

Petitioners, therefore, ignore the facts that there was a risk of total loss absent unitary resolution, there was a way to eliminate that risk with a unitary resolution, and that is what the class accomplished. The resolution had to include all the class members. The insurers had either to settle the state insurance appeal or litigate it. This insurance coverage case, by its very nature, had to be resolved in a unitary fashion. Fibreboard, in turn, could not give over all its insurance to the class and leave itself exposed, defenseless, to a quick death at the hands of opt-outs, given the chance it might prevail on the appeal and thus use Continental insurance to cover pre-1959 claims and Pacific money to cover

post-1959 claims. Any resolution required participation by every constituency with legal interests in the policies.

In short, this case fell squarely within Rule 23(b)(1)(B), something petitioners do not contest, and the dissenting judge below expressly conceded. (App. 120a-121a, n.17, 130a, 132a). That Rule, in turn, is consistent with cases exemplified by *Smith v. Swormstedt*, 57 U.S. 288 (1854), which approved mandatory classes to resolve a matter of common interest. There is no right to opt out under those circumstances.

The *Brown* and *In re Real Estate Title* cases involved the same settlement which combined injunctive relief and foreclosed damages actions without paying any money for them. It was a hybrid settlement with separate injunctive and damages pieces. The personal injury claims here also create legal interests in the insurance policies, as well as extremely important economic interests in resolving the coverage disputes over those policies. The two are bound together, on this record, by the inability to settle one without the other. The case is not like *Brown* or *In re Real Estate Title*.

D. The Notice Issue Is Different Here Than In Amchem Products.

Amchem Products involved a settlement that fixed ranges of compensation for various diseases and required people to choose whether to opt out not knowing what disease they might contract. This settlement does neither. The purpose of notice here was for class members to decide whether to eliminate the "real and enormous risk" (App. 76a) to *all* class members arising from the coverage disputes, or whether to object to the proposed resolution. All class members had the same interest based on the same information as to this question — and even petitioners do not contend that any class member reasonably would decide to accept that risk. To the extent that conceivable objections could be conjured up, the Ortiz petitioners amply provided that service. As in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319, notice received by some class members "is likely to

safeguard the interests of all, since any objection sustained would inure to the benefit of all."

E. This Class Action Which Transferred $1.5 Billion From Insurers To The Class Presented A Justiciable Controversy.

Once again, petitioners' arguments overlook that there were dual legal interests which class members possessed and which the class action proceeding redressed: their personal injury claims arising from exposure to Fibreboard's asbestos-containing products, and their interests in the insurance which could provide their sole source of recovery. This case resulted in a massive transfer of wealth from two insurers to a trust for the sole benefit of a class of people to satisfy both their interests in the policies, and their personal injury claims, now and in the future.

1. There was nothing feigned about the case.

The complaint pleaded exposure to Fibreboard asbestos by both the named plaintiffs and class members. (App. 553a-556a). It pleaded the insurance policies, the existing coverage controversy, and the likely inability of Fibreboard to compensate class members absent indemnification from the insurers. (App. 558a-559a). The issues that this class action resolved were whether the insurance controversies would end, the risk to the class would be eliminated, and the class would receive the money. Jurisdiction existed over those claims just as they did in *Rudd*. Contrary to petitioners' assertion (Petition 27), the judgment did redress claims pleaded in the complaint; for it made money available to compensate the class, whereas otherwise there may well have been none. Any argument that a pre-filing tentative settlement destroyed jurisdiction is answered by the consent decree cases. (*See, e.g., Swift & Co. v. United States*, 276 U.S. 371, 325-36 (1928); *S.E.C. v. Randolph*, 763 F.2d 525, 528 (9th Cir. 1994).

2. All class members had injury in fact.

Every class member had either exposure to Fibreboard products or claims derivative of such exposure, and had interests in the policies. They stood to lose as to both.

Simply as to the personal injury claims, the district court found that each member of the class, including each so-called "exposure-

only" claimant, had a good faith basis to argue for application of California law permitting recovery against Fibreboard, located then in California (App. 251a-252a), citing *Potter v. Firestone Tire and Rubber Co.*, 863 P.2d 795, 816 (Cal. 1993); *Miranda v. Shell Oil Co.*, 15 Cal. Rptr. 2d 569 (Cal. Ct. App. 1993); *Barras v. Monsanto Co.*, 831 S.W. 2d 859 (Tex. App. Houston [14 Dist.] 1992, writ denied). And even if they did not, "jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which [plaintiffs] could actually recover." *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1010 (1998), quoting from *Bell v. Hood*, 327 U.S. 678, 682 (1946).

As noted, the "judicially cognizable interests" (*Bennett v. Spear*, 117 S. Ct. 1154, 1163 (1997)) that were involved before the district court included the legal rights held by this class and every member of it under California law as to the insurance policies. Federal court standing even in a diversity case depends on the actual issue to be decided, and that issue need not be the claim pleaded in the complaint. *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72 (1991).

Hence, the theory of standing unanimously approved as to the backup settlement by the Fifth Circuit in *Rudd*, and endorsed by petitioners there, applies here. The *Rudd* class was in a position to defend the insurers' suit on the ground that the settlement fund was insufficient, because it did not provide additional money for defense — precisely why Fibreboard balked at accepting the backup settlement amount. As members of the defendant class in *Rudd*, the global class could have insisted, as a condition to any settlement, that it get the money and institute an equitable method to distribute the funds among the class, the trade-off being that Fibreboard would obtain a release. That is what happened in this case.

CONCLUSION

The petition is defective because it does not properly present questions that arise on this record. This case is much different from *Amchem Products* or any other class action likely to be brought.

This Court should deny the petition.

Respectfully submitted,

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APPENDIX A — BARON AND BUDD FIFTH CIRCUIT BRIEF IN *CONTINENTAL CASUALTY CO. V. RUDD*

95-40694

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE ASBESTOS LITIGATION

CONTINENTAL CASUALTY CO., et al.,

v.

RUDD, et al.,

On Appeal from the United States District Court
for the Eastern District of Texas, Tyler Division

***AMICI CURIAE* BRIEF OF ESTEBAN Y. ORTIZ, ET AL. IN SUPPORT OF APPELLEES**

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Appendix A

CERTIFICATE OF INTEREST OF AMICI CURIAE

No. 95-40694
Continental Casualty Co., et al. v. Rudd, et al.

Pursuant to Fifth Circuit Local Rule 28.2.1, as modified by Local Rule 29.2, the Ortiz Appellants hereby certify that the following listed persons constitute the *Amici Curiae* interest:

Amici Curiae:

Esteban Yanez Ortiz, Edee Cochran, Lester E. Taylor, John Allgood and Henry Evers

Trial and Appellate Counsel for *Amici Curiae*:

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Appendix A

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Appendix A

STATEMENT OF THE INTEREST OF *AMICI CURIAE*

Amici curiae Esteban Yanez Ortiz, Edee Cochran, Lester E. Taylor, John Allgood, and Henry Evers are all members of the defendant health claimant class in *Continental Casualty Co. v. Rudd*, in addition to being members of the plaintiff class in *Ahearn v. Fibreboard Corp*. These class members did not participate in the district court proceedings in the *Rudd* case, but they intervened in *Ahearn* for purposes of objecting to the proposed plaintiff class settlement releasing class members' present and future personal injury claims against Fibreboard. *Amici* appealed from the district court's judgment in *Ahearn*, and their initial brief in that case ("Brief of the Ortiz Appellants") is now on file with this Court.

Despite their strenuous objections to Ahearn, *amici* fully support the *Rudd* judgment, which neither extinguishes nor impairs asbestos victims' claims against Fibreboard, but instead merely resolves a declaratory judgment action by Fibreboard's insurers against two defendant classes of individuals with a colorable basis for objecting to the reasonableness of the policies' settlement. The agreement between Fibreboard and its insurers is highly beneficial for asbestos victims because it eliminates the risk that billions in insurance proceeds will be lost in the event that Fibreboard does not prevail in the Coverage Case.

STATEMENT OF THE CASE RELEVANT TO *AMICI CURIAE* ARGUMENT

This case, *Continental Casualty Co. v. Rudd*, relates to an October 12, 1993, settlement agreement (the "Trilateral Agreement") among Fibreboard Corporation and certain of its insurers, Continental Casualty Company, CNA Casualty Company, and Pacific Indemnity Company (the "insurers"). The Trilateral Agreement confirms the insurers' coverage of tort liability arising from Fibreboard's manufacture of asbestos and provides for an approximately 3.5 billion dollar liquidation of

Appendix A

the policies.[1] The agreement eliminates the risk that the insurers will be absolved of liability in a California state case, *In re Asbestos Insurance Coverage Cases*, Judicial Council Coordination Proceeding No. 1072 (the "Coverage Case"), now stayed pending resolution of this case. By its terms, the Trilateral Agreement requires court approval, in a "Settlement Agreement Approval Judgment," of the settlement of the Coverage Case. This judgment was obtained in *Rudd*.

In contrast to the class settlement at issue in *Ahearn*, the *Rudd* judgment has no effect on asbestos victims' tort remedies, "except to the extent that potential rights of direct action against the Insurers will be abrogated by [the Settlement Agreement Approval Judgment]." (*Rudd* FOF:70¶113).[2] *Rudd* is an adjudication of "whether the Insurers and Fibreboard may settle — without the consent of any other individual or entity — legitimate insurance coverage disputes by paying fair value, in a way that terminates all rights that might be asserted by strangers to the disputed policies[.]" (*Rudd* FOF:63¶103). "The principal legal question presented by the case is whether, and under what circumstances, an insurer and an insured (here, the Insurers and Fibreboard) may settle their insurance policy." (*Rudd* COL:21¶43(a)). The two classes subject to the *Rudd* declaratory action are individuals with a colorable stake in Fibreboard's insurance coverage.

Although the Trilateral Agreement contemplates that judgments could be entered in both *Ahearn* and *Rudd*, the agreement also anticipates that only the *Rudd* judgment may be

1. Under the agreement, 2 billion will be paid to Fibreboard to defend and indemnify post-August 27, 1993 claims. Additionally, all previously pending cases will be defended and paid by the insurers (JA76:9-15).

2. Citations to "*Rudd* FOF" reference the district court's Findings of Facts entered in *Rudd*. See Flanagan RE13. Citations to "*Rudd* COL" reference the district court's Conclusions of Law entered in *Rudd*. *See* Flanagan RE5.

legally feasible (JA76:4, 10-15; *Rudd* FOF:47¶80,53¶91). *Rudd* therefore effects a stand-alone, back up agreement regarding Fibreboard's insurance coverage independent of the plaintiff class settlement of personal injury claims instituted in *Ahearn* (*Rudd* FOF:47-8,¶¶81-2). Fibreboard and the insurers intend that the Settlement Agreement Approval Judgment in *Rudd* be effective notwithstanding the lack of viability of the Global Settlement Agreement entered in *Ahearn*:

> Whether or not the Global Settlement Agreement is executed or obtains the final necessary court approvals to become effective, upon entry of Settlement Agreement Approval Judgment the parties desire and intend by this [Trilateral] Settlement Agreement to fully and finally compromise all claims under the Insurance Policies not previously released, including any and all claims asserted in the Coverage Case.

(JA76:4¶O). The agreement details the procedure to be followed if the Settlement Agreement Approval Judgment succeeds but the Global Settlement fails: approximately two billion dollars will be paid to Fibreboard for its use in paying unliquidated tort claimants, who will still retain the right to bring tort actions against Fibreboard (JA76:10-15 §2.3, 18 §3.3). This outcome provides the appropriate resolution of this entire appeal.

This *Amici Curiae Brief* urges affirmance of *Rudd* despite the fact that the Ortiz Appellants' Brief in *Ahearn* argues for reversal of that case. The only asbestos claimants opposing *Rudd* are the Flanagan Appellants, who "did not present any credible evidence that the Trilateral Settlement Agreement is an inadequate or insufficient settlement, and did not offer a cogent reason why the [district court] should decline to enter such judgment." (*Rudd* FOF:70-71¶114; *see also Rudd* FOF:56).

SUMMARY OF THE ARGUMENT

Rudd does not present the same case and controversy issue that undermines the judgment in *Ahearn*, as the *Rudd* classes were not represented by class counsel in *Ahearn*, the *Rudd* dispute between the insurers and the class of potential asbestos victims was not settled *ab initio*, and the relief prayed for in the *Rudd* complaint was not feigned. Because *Rudd* is predominantly equitable and is certifiable under subsections (b)(1) or (b)(2) of Rule 23, *Rudd* also is distinguishable from *Ahearn*, which, if certifiable for class treatment at all, is properly certifiable only as a Rule 23(b)(3) class. Here, unlike in *Ahearn*, Rule 23(a)'s commonality and typicality requirements are met because the claims to be adjudicated in *Rudd*, the defendant class members' colorable challenges to the reasonableness of the insurers' settlement with Fibreboard, raise issues that are identical for each class member. Whereas the district court in *Ahearn* relied completely on the terms of settlement to create the requisite commonality and typicality, here the reasonableness and propriety of the Trilateral Agreement is the central issue to be litigated in the Insurers' declaratory judgment action.

ARGUMENT

I. THE TWO BILLION DOLLAR LIQUIDATION OF FIBREBOARD'S POLICIES WITH THE INSURERS BENEFITS ASBESTOS VICTIMS.

If *Ahearn* is reversed and *Rudd* is affirmed, then $1.525 billion plus interest from the insurers, and an additional $475 million, less certain deductions, will be made available to Fibreboard to pay costs and claims arising from asbestos injuries (*Rudd* FOF:53-54¶91; JA76:10-15§2.3, 18 §3.3). However, for these substantial funds to be available to Fibreboard, and thus indirectly to future asbestos victims, the judgment in *Rudd* must be affirmed here (*Rudd* FOF:55¶93 (explaining Trilateral)). Fibreboard's counsel testified that the settlement quantum likely

will cover the entire cost of Fibreboard's future asbestos claims, and Fibreboard has publicly attested to the fairness of the *Rudd* settlement (*Rudd* FOF:66¶107; JA7:436-37, 621-22, 2667-74). The district court correctly determined that no third parties' rights were abrogated by the Settlement Agreement Approval Judgment. While certain states' laws impose a duty upon insurers and insureds to negotiate fairly with each other, no state or territory grants claimants a "veto" power to prevent an insured from liquidating the policy in a reasonable, arm's-length settlement (*Rudd* COL:22-23¶43).

Fibreboard and the insurers fought for nearly two decades before resolving their coverage dispute (*Rudd* FOF:55¶93). The insurers were unwilling to pay more than the amounts ultimately achieved under the Trilateral Agreement (*Rudd* FOF:65¶106; JA7:1445, 1461-62, 1470-79, 1542). If the Trilateral Agreement is not ultimately approved, future asbestos victims face a risk that Fibreboard may lose the Coverage Case, rendering tort judgments against the company uncollectible (*Rudd* FOF:55¶93). The district court found that "the consequence of non-recovery presented to the classes if the significant risk posed by the Coverage Case materializes is so dire as to be unacceptable if a reasonable alternative is available." (*Rudd* FOF:64¶105). Even the California Supreme Court's favorable adjudication of the Coverage Case does not assure immediate termination of the litigation, as issues unique to the parties are still pending in the Court of Appeal (*Rudd* FOF:61¶100). Thus, even under the best of scenarios, the claimants face years of uncertainty absent settlement. *Id.*

With the exception of counsel for the Flanagan Appellants, the overwhelming consensus of all informed counsel is that the insurance settlement is in the best interest of asbestos victims (see *Rudd* FOF:56¶93). The representatives of the defendant class of asbestos-exposed individuals were gravely concerned that the California Supreme Court will eviscerate Fibreboard's insurance coverage by adversely deciding the Coverage Case. *Id.* Professor

Eric D. Green, the Guardian Ad Litem in *Ahearn*, opines that the risks of "roll[ing] the dice" in the Coverage Case are too significant for future asbestos victims to take this chance (*Rudd* FOF:56-57¶93). Counsel for the *Ahearn* class of future asbestos victims similarly believe that the benefits of the policies' settlement outweigh the risk of future litigation in the Coverage Case (*Rudd* FOF:56¶93).

After massive international notice, only one member of the asbestos claimants' bar and a minuscule number of asbestos-exposed individuals objected to the *Rudd* settlement. The *Rudd* detractors presented "no substantial evidence of economic inadequacy or practical detriment" caused by court approval (*Rudd* FOF:67-68¶¶108-09). Even a client of Mr. Jaques, counsel for the lone Flanagan objectors to *Rudd*, supports the settlement (*Rudd* FOF:68¶110; JA7:3021-25). Although defining themselves as a maritime class, the Flanagan Appellants also stand in opposition to the American Merchants Marine Veterans, a national organization that supports the *Rudd* settlement. *Id.*

In addition to its independent assessment that the Trilateral Agreement was fair, reasonable, and arm's-length, thus justifying the requested declaratory relief, the district court held that the class representatives' consent was valid. The court-appointed counsel for the *Rudd* defendant class of asbestos victims consented to the entry of the Settlement Agreement Approval Judgment at trial. Consent was "fully independent[,]" and made "only after careful consideration of the circumstances, based upon [the representatives'] independent determination that this furthered the best interests of the respective classes." (*Rudd* FOF:60-61¶99). The "unusually complete information" illuminating the benefits of the settlement include full discovery and trial in the district court; exhaustive discovery, trial, and appellate briefing in the Coverage Case; and decades of underlying asbestos personal injury litigation (*Rudd* FOF:61-62¶101; JA7:650-53, 1129-36).

By affirming *Rudd* and reversing *Ahearn*, this Court can maintain the institutional integrity of the federal courts which is threatened by the proposed quasi-legislative tort reform program that is the subject of *Ahearn*, and simultaneously ensure that future victims will have access to proceeds from Fibreboard's contested insurance coverage. *Ahearn* and *Rudd* "create very different procedures for handling" the insurance proceeds (*Rudd* FOF:52¶89). *Rudd* does not affect tort claimants' ability to sue Fibreboard in the future as their claims become ripe. Without the waivers and restrictions of the Global Settlement Agreement in *Ahearn*, the injured claimants will be able to sue Fibreboard and to include their lawful claims for punitive damages, joint and several liability, and pre- and post-judgment interest.

II. A CASE AND CONTROVERSY EXISTS IN *RUDD*.

A. *Rudd* Class Counsel Litigated Their Clients' Claims.

The procedural history of *Rudd* significantly differs from *Ahearn* on the issue of whether a live controversy supports justiciability. The two defendant classes certified in *Rudd* are a Health Claimant Class of parties exposed to asbestos who had yet to bring a claim against Fibreboard, and a Third-Party Claimant Class of those with potential liability related to these exposed parties' claims, as, for example, other manufacturers of asbestos-containing products that could be co-defendants with Fibreboard (*see Rudd* FOF:3). Although the definitions of the *Ahearn* plaintiff class and *Rudd* defendant health claimant class coincide, the *Ahearn* plaintiff class counsel, which was hand-picked by Fibreboard, did not represent the defendant class of asbestos-exposed individuals in *Rudd*. The *Rudd* Health Claimant Class counsel was appointed independently by the district court after the case was filed (*Rudd* FOF:8¶8). Rather than agreeing to the case prior to its commencement, as occurred in *Ahearn*, counsel for the Health Claimant Class and Third-Party Claimant Class in *Rudd* answered the complaint, denying the insurers' right to a declaratory judgment and raising numerous affirmative

defenses to the action (*Rudd* FOF:9-10¶¶11-12). *Rudd* defendants' class counsel participated in discovery as adversaries to the insurers (see *Rudd* COL:10¶21; *Rudd* FOF:11¶13). It was not until after trial that class counsel consented to the terms of the Trilateral Agreement (*Rudd* FOF:13¶17, 14¶19), and they did so only after negotiating an amendment to the terms of the Trilateral Agreement to provide for a "Special Reserve Agreement" setting aside $50 million to enhance the prospect that claimants in later years will have access to funds (*Rudd* FOF:71¶115).

B. Whether the Settlement Is Reasonable Is an Issue Ripe for Adjudication.

The *Ahearn* settlement releases tort claims against Fibreboard for injuries that do not exist but might occur in the future. In contrast, *Rudd* resolves the propriety of an *existing* settlement among Fibreboard and its insurers. The *Rudd* claims are ripe for judicial review because the facts that give rise to the defendants' right to oppose the settlement have already transpired. " 'A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required.' " *Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1153 (5th Cir. 1993) (quoting *New Orleans Public Service, Inc. v. Council of New Orleans*, 833 F.2d 583, 587 (5th Cir. 1987)). No further facts bear on whether the settlement among the insurers and Fibreboard was reasonable at the time it was reached or whether the manner of the policies' liquidation was fair.

Even if this Court considers unripe the claims of the Insurers with respect to defendant class members who currently have no asbestos-related disease, the class relief sought here is appropriate because many defendant class members, including *amici* Esteban Ortiz, John Allgood, and Henry Evers, already have asbestos-related injuries. With respect to such defendant health claimant class members who *do* have current asbestos-

related injuries, their interest in the liquidation of Fibreboard's insurance policies is unquestionably ripe for adjudication today. And, as noted by the Rules Advisory Committee with respect to Rule 23(b)(2), "[a]ction or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class." Rules Advisory Committee Note to Subdivision 23(b)(2). Because the Insurers' claim regarding the propriety of the Trilateral Settlement is, at the very least, ripe with respect to defendant class members who now suffer from a current asbestos-related disease, their request for declaratory relief with respect to the entire class is permissible. Here, "the adjudication of the issue as to one class member must be an adjudication as to all[,]" (*Rudd* COL:16¶35), and the relief with respect to currently ill defendant class members therefore has general application to class members who have not yet developed any asbestos-related condition.

III. THE *RUDD* CLASSES RECEIVED DUE PROCESS.

The constitutional limitations on employment of the class action device articulated in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), are not violated in *Rudd*.[3] In *Shutts*, the Court took great care to note that the due process requirement of a right to opt-out does not apply to equitable claims: "Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments." 472 U.S. at 812 n.3. Here, the insurers' request for declaratory and injunctive relief falls outside the bounds of *Shutts*, in sharp contrast to the money damages claims at issue in *Ahearn*. The monetary consideration in *Rudd* does not change hands between the plaintiff insurers and the defendant classes;

3. The Ortiz Appellants contend that *Shutts* is violated in *Ahearn* (*compare* Ortiz Appellants' br., 26-34).

rather, the effect of the Settlement Agreement Approval Judgment is merely court approval of the policies' liquidation. Furthermore, *Rudd* does not implicate the same fundamental fairness concerns regarding individual control that necessitate an opt-out right in *Ahearn*.

Unlike class members in *Ahearn*, the members of the health claimant class in *Rudd* currently possess sufficient information to determine whether to challenge the settlement, and they are each identically situated for purposes of assessing that information. The facts shaping the substantive claim in *Rudd* — whether the settlement was fair — have already been fully developed. This sharply contrasts with the *Ahearn* class claims released in that settlement, which are based on injuries and factual circumstances that have not yet occurred and will be individual to each claimant.

The district court's approval of the policies' liquidation in *Rudd* is more akin to the trust, common fund, and suit to quiet title cases relied upon by the district court in *Ahearn* and distinguished by the Ortiz Appellants (*see Klugh v. United States*, 818 F.2d 294 (4th Cir. 1987); *Hatch v. Riggs Nat'l Bank*, 361 F.2d 559 (D.C. Cir. 1966); *Meyer v. Citizens and Southern Nat'l Bank*, 677 F. Supp. 1196 (M.D. Ga. 1988) (discussed in Ortiz Appellants' br., 50)). The tort claims extinguished in *Ahearn* are individual, depend on unique and future facts, and do not require present extinction on a global basis. By contrast, *Rudd* invokes the classes' collective, fungible interest in a single settlement agreement of the insurance coverage dispute and will make approximately $2 billion dollars available to Fibreboard for asbestos victims who may pursue their individual tort claims and due process rights.

The *Klugh* court, in permitting present resolution of futuristic claims, relied on a "remaindermen" theory, which requires that "one of the parties to the action is so closely aligned with the interests of the nonparty as to be his virtual

representative." 818 F.2d at 300. Any *Rudd* claimant qualifies as a virtual representative of the other with regard to challenging the arm's-length quality and fairness of the settlement. Regardless of how one was harmed by asbestos, whether Fibreboard and the insurers settled the policy for a reasonable quantum and in an arm's-length transaction are identical issues shared by all. Because one's individual injury from asbestos is unique, the *Ahearn* extinction of individual personal injury claims in global form is both unnecessary and impermissible. Whether a single tort claimant chooses to settle a claim with Fibreboard has no inherent interrelation to another victim's decision to settle. In *Rudd*, by contrast, the court's adjudication of the propriety of the settlement necessarily determines the rights of all people with any claims to the policies, as did the adjudications regarding common property in *Klugh*, *Hatch*, and *Meyer*.[4]

IV. RULE 23 IS NOT VIOLATED.

A class action must satisfy the requirements of Rule 23(a) and at least one of the requirements of Rule 23(b). Fed. R. Civ. P. 23. Because the issues of fairness and arm's-length character of the settlement negotiations and the reasonableness of the settlement amount are common to all class member claims, Rule 23(a) is satisfied. The Rule 23(b) requisite is met because *Rudd* is certifiable under either Rule 23(b)(1)(A) or 23(b)(2).[5]

4. Similar to *Klugh*, the holding in *Hatch* was derived from the "contingent remaindermen" theory. 361 F.2d at 566. *Hatch* and *Meyer* both assume that a guardian ad litem could be appointed to represent the interest of unborn children in a trust or real property without violating federal constitutional due process. *Id.*; *Meyer*, 677 F. Supp. at 1209.

5. The district court determined that Rule 23(b) was met in any one of three ways: under subdivision 23(b)(1)(A), 23(b)(1)(B), or 23(b)(2) (*Rudd* COL:13¶30). This Court need not address whether the Rule 23(b)(1)(B) "limited fund" provision applies, as two alternate theories for certification justify affirmance (*see Rudd* COL:17¶36 ("[I]t is not necessary for the Court to analyze the case in terms of the existence of a 'limited fund.' ")).

Unlike the *Ahearn* case, in which numerous individual issues regarding exposure, medical causation, and damages pervade and predominate each plaintiff class member's claim against Fibreboard, the Insurers' claims for declaratory relief in *Rudd* all reduce to issues regarding the fairness of the Trilateral Agreement and the non-collusiveness of its negotiation. Because those issues are identical with respect to all defendant class members, they satisfy Rule 23(a)'s requirements of commonality and typicality. As tort claims against Fibreboard are not directly at issue in this case, individual issues endemic to asbestos litigation pose no obstacles to certifying a class.

The requirements of Rule 23(b)(2) and (b)(1)(A) are met in *Rudd* because the district court proceeding was effectively an action by the Insurers to quiet legal title to a fixed asset — Fibreboard's insurance policies. Subdivisions (b)(2) and (b)(1)(A) were both designed to apply in situations in which the relief sought would necessarily determine the rights of all class members, regardless of their individual circumstances. *See* Rules Advisory Committee Note to Subdivision 23(b)(2) ("[t]his subdivision is intended to reach situations where . . . final relief of an injunctive nature or of a corresponding declaratory nature, settle[s] the legality of the behavior with respect to the class as a whole"); Rules Advisory Committee Note to Subdivision 23(b)(1)(A) (explaining that certification under subdivision (b)(1)(A) is appropriate to avoid incompatible adjudications with respect to rights and duties regarding particular property).

As potential third-party beneficiaries to that asset, all of the defendant health claimant class members have an interest in pursuing a legal claim to the settlement proceeds. The Insurers filed this action seeking a declaration that no such legal claim would be valid if made directly against the insurance policies, and that Fibreboard, as the insured, is the proper holder of title to the proceeds from the liquidated policies. The Insurers' right to such a declaration turns solely on the facts surrounding the

settlement they reached with Fibreboard, rather than on any individual circumstances of defendant class members. Thus, any adjudication of the Insurers' right to quiet title with respect to a single defendant class member necessarily determines the rights of all other class members, (*Rudd* COL:16¶35 ("the adjudication of the issue as to one class member must be an adjudication as to all")), and the district court's certification under Rule 23(b)(1)(A) or 23(b)(2) was therefore proper.

CONCLUSION

The *Rudd* judgment is in the best interest of Fibreboard's asbestos victims. Unlike the private adjudication system created by *Ahearn* to substitute for the state and federal courts, the *Rudd* judgment leaves individual class member claims against Fibreboard untouched and merely allows certain of Fibreboard's insurers to liquidate the policies by making substantial funds available to Fibreboard. The constitutional and procedural problems requiring reversal in *Ahearn* are not an obstacle to *Rudd*. The judgment in *Rudd* should be affirmed.

Respectfully submitted,

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APPENDIX B — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

FREDERICK M. BARON STATEMENT

[Commencing at page 89]

* * *

Your Honor, let me also begin by clearing some brush. We think that the settlement that was reached between Continental Insurance, Pacific and Fibreboard is a superior settlement; we think it is something that ought to be approved very promptly by this court; and we think that that settlement will resolve all of the issues that otherwise would be before this court. That settlement known as the trilateral is a great settlement, as far as I'm concerned, I know of no one that opposes it. . . .

* * *

STEPHEN M. SNYDER TESTIMONY

[Commencing at page 171]

* * *

Q. All right. What did you do to come up with a new, better or improved SSP?

A. Couple of things. We had information from the people that we had talked to, it was pretty clear that they had a couple of problems. First of all, they wanted some cash before they would accept any kind of arrangement. And they weren't totally against the idea, but they were concerned that Fibreboard could not be trusted to conserve its [172] resources and that if they didn't pull its resources out of it right now it might run away and hide those resources at a later time. So they were concerned about that. And in many of our talks with people, we were told that the people that they referred to or consulted with on what to do

about their Fibreboard cases were the lawyers in California, principally the northern California lawyers Steve Kazan and Howard Wartnick. We went back with the thought if we could make the structured settlement program work with those two lawyers that the word would get out that this was a program that could be trusted and accepted.

So we met with them late in 1988. I think they investigated the coverage case, they did some basic work on Fibreboard's corporate resources, and we negotiated a structured settlement program in 1988 that had a 40 percent cash component in it for the pre-'59 cases that were covered by the Continental and Pacific policies if we won the cases. But we didn't have to pay any cash on the post-'59 cases, where our resources were thinnest. That was one component.

The other component was that in each structured settlement program deal that Fibreboard [173] signed, it made a promise to the claimant that it would not make any impermissible distributions, that's a term of — defined term in the agreement. That means it would not make dividend distributions of any kind above a certain limit, it would not do a leveraged buyout, it would not do any of those corporate reorganization type things that the plaintiffs were afraid that a company like Fibreboard would do in order to escape liabilities in the litigation. That was the structured settlement program that we negotiated with Harry Wartnick and Steve Kazan, and that was half of the program.

The other half of the program was we had to figure out how to pay the 40 percent, because 40 percent was — we didn't have that much money. Fibreboard had just over a hundred million dollars, and that was not going to be enough to finance this program. So we went to Continental and to Pacific and talked about a possible coverage settlement. It was clear we couldn't do a complete settlement, and it was clear with Pacific that they were not interested in an interim agreement. And so we entered

into an interim agreement with Continental Casualty in December of 1988.

* * *

[184] Q. . . . Did you attempt, in about this period of time, to work out a settlement with CNA and Pacific?

A. If about this time is late 1990, I believe we did.

Q. All right. And, briefly, what did you propose and what was the result?

A. It came out of negotiations to get the caps lifted on the defense costs and their agreement, [185] those being unsuccessful, Fibreboard proposed to Pacific Indemnity and Continental that we negotiate a complete policy buyout. That was discussed and Fibreboard made a proposal in late 1990 to accept a certain amount for complete release of all the coverage obligations under the policies.

THE COURT: Was the coverage case — what was its status at that point?

A. In January 1990, Your Honor, Judge Brown issued his judgment, and I think the —

THE COURT: Okay. This was post-judgment?

A. This was post-judgment.

THE COURT: But shortly after?

A. Very shortly after.

MR. MILLER:

Q. You were unable to reach an agreement with the two carriers?

A. That's right. We made a demand and it was rejected. I think Pacific was interested in doing a complete policy buyout, but Continental was not at that time. The demand was $750 million, I believe.

* * *

[231] * * *

Q. Turning your attention to early 1993, Mr. Snyder, what did you consider to be your bargaining position with respect to Continental at that point?

[232] A. Going back to the three things that we had on our minds in 1990, when we started the assignment program, in early '93 we had a new Pacific Indemnity deal which called for a 5.2 order but which could give us as much as $360 million, which I hoped would be enough for Mr. Inselbuch, if I got back to the bargaining table with him, for post-'59 cases. We needed a 5.2 order to ring the bell at that high number. And so we were in litigation against Continental in Texas in the Ness Motley deal in order to get that order.

The assignment program had been a very substantial success, and so we had over a billion two in settlements that we had done. But just as important, it looked as though we would be able to do as many of those settlements as we wanted in the future. And so that is something that we were aware of and I'm sure Continental was aware of. And those two things gave us great leverage and great credibility with Continental. We had enough money to pay for the post-'59 cases in a global negotiation, and we had a settlement vehicle that was very unfriendly to Continental that could keep us out of trouble in

the litigation and alive long enough to get to the coverage case result.

* * *

[303] * * *

Q. When you were negotiating with the Ness Motley [304] firm at that time, how big of a factor were they for Fibreboard? What percentage of the cases across the country did they control or were they involved in?

A. To one extent or another, it appeared they were involved in about 50 percent of all cases brought against Fibreboard across the country.

* * *

[309] * * *

Q. All right. So armed, as it were, with what you thought was an imminent assignment based on the global with the plaintiffs, you turned to the April 9 agreement. And I would like for you to tell us from your perspective what it is basically that Fibreboard got in that agreement and basically what it was that Continental gave.

A. We reached a compromise —

MR. MILLER: Wait a minute.

[Laughter]

MR. MILLER: I'm sorry. You had to give something up to get it, Mr. Snyder.

Q. Would you tell us what that was?

A. We had several meetings with Judge Higginbotham. We had several meetings in Dallas [310] where Judge Higginbotham was — his office is, Fifth Circuit, and I believe it was at the law firm Vinson & Elkins there. Those meetings went late into the evening, they were fractious, they were contentious, sometimes they were downright nasty. What was most difficult in my perception for Continental was making the commitment to get the global and have it include all the cases, particularly the language, the best-efforts language, which was I believe viewed by them, I know it was viewed by me as a standard that could be judged in the courts and by which they could be held.

* * *

[316] * * *

Q. Did you then make some effort to put together a bilateral, so-called, insurance settlement following that meeting?

A. A couple of things were going on at that time. We had available to us Judge Higginbotham's offices. We were still working with him in connection with the Ness Motley deal. He was still listening to us about global matters. And so on one front, I think we prevailed upon him to try to assist the parties in — in putting something back on the global front. And I think there was a certain amount of depression and despair on the Fibreboard/Continental side. So we did discuss the possibility of perhaps Continental buying out the Fibreboard policy and then Fibreboard would do what it could either to do its own global or simply go off on its own.

Q. And what happened to those discussions?

A. We had meetings in New York, we had a meeting in San Francisco. They were very unproductive meetings. In fact, you know, it was — it would have been better had the meetings never occurred for the ability of Fibreboard and Continental to work

together. And it was very clear that we weren't [317] going to be able to do that sort of deal.

* * *

[335] * * *

Q. How long did it take you to negotiate the terms of what became known as the trilateral settlement?

A. That took most of the day the next day, or most of the morning the next day. Fibreboard obviously wanted the global. The global was a triggering event under the April 9th agreement for Fibreboard to get all its cases covered. The demand of Fibreboard, however, from Continental was that it would pay no more for the trilateral than it was paying for the global.

Q. Period?

[336] A. Period. Fibreboard's point was that if — if the — if the trilateral was all it had, it would incur substantially higher defense costs in the tort system and that money would nowhere be equivalent to what it would be in the global.

We got nowhere with that. And we therefore basically ate the defense component in order to get the global done. And we accepted that term. And that's the term that was laid on the record the next day, that the trilateral that ultimately was worked out would have the same price as the global, and that's what we agreed to.

* * *

[379] * * *

A. The — major issue, the major difference between those two situations has to do with the amount of dispute and transactional

costs that will be in the system. In the trust situation, because of the way that the trust is designed, we're all hopeful that the expenses of administration and defense will be kept within the 10 to 15 percent range that we've relied on experts to advise us on. There is some evidence in other similar circumstances to suggest that that is a — is a reasonable estimate. And we're hopeful that we can stay within that range. We already know what happens in the tort system. In the tort system, we — well, also under the trust, obviously, the plaintiffs' counsel fees are limited to 25 percent. So we're talking about appreciable [380] extra value delivered to claimants in that system.

In the tort system, we know, and one of the purposes of my going through the Fibreboard defense costs yesterday is that it is not unusual to see the defense costs equal and be at the same level as the indemnity payments. In the years 1988, '89 and '90, when Fibreboard was defending claims to set values and was keeping the value in the 5,000 to $4500 range, where I think it belongs, Fibreboard was spending more money on defense than it was spending on indemnity.

* * *

[453] * * *

Q. Okay. If after the complaint was filed, you're [454] not able to come to terms with plaintiffs' counsel and Continental and Pacific on all of the specifics of the global settlement agreement, was there a provision — would there have been an understanding among the parties as to what would have happened in Ahearn?

A. I think my understanding — I can't speak for everybody, Mr. Baron, but my understanding was that if Fibreboard didn't nail down this global, that it was either going to get prosecuted in Linscomb or it was going to get prosecuted in some class action someplace.

* * *

[464] * * *

Q. Okay. Mr. Snyder, do you have an explanation for me as to why so many people filed claims against Fibreboard prior to the injunction in this case?

[Laughter]

A. I believe — well, I — you know, I'm astounded by that question.

[Laughter]

A. I believe that that is a testament to — to the [465] operation of the contingency fee system in this litigation.

MR. BARON:

Q. Well, are you saying that what was happening here is that lawyers realized that there might be a different deal that might not be as good for their clients and they wanted their clients to get in under the wire?

A. I'm saying it didn't have anything to do with their clients; it had to do with their own financial self-interest, that's what I'm saying.

Q. And what evidence do you have of that?

A. 15 years experience in this litigation and knowing the difference between people who care about their clients and people who don't.

* * *

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[517] * * *

Q. [By Mr. Baron] And that's what you interpreted his suggestion to broaden?

A. Yes.

Q. I see. Did you ever attempt to do that, by the way?

A. I talked to a lot of people all through this period during my settlement negotiations about whether we had enough people and the right people. I talked to you, too, about it. And I felt comfortable that we had the right group of people. For the most part, the lawyers in the east and in the Gulf States rely on Steve Kazan and Harry Wartnick about Fibreboard matters. And everybody, including you, told me I couldn't do a deal without Ness Motley.

* * *

[593] * * *

A. Fibreboard, on August the 27th, in order to get a global, went along with Continental's demands. Otherwise, no way would we have entered into that settlement.

Q. Were you forced into it?

A. I don't want to use the term "forced," but it was an awful big carrot.

Q. $2 billion is a pretty good size carrot.

A. No, that's not the carrot, Mr. Baron.

Q. What's the carrot, Mr. Snyder?

A. It was the global settlement agreement that we could not

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have, plaintiffs said, unless we also entered into a bilateral with Continental, and Continental said we couldn't have unless we priced it on the identical terms as the global, which was not in a bilateral negotiating settlement acceptable to [594] us.

Q. So the thing that forced you into the bilateral or trilateral, as it's called, was the plaintiffs working out this arrangement for global?

A. Was the existence of the agreement in principle that was put on the record on the 27th, whereby we had a reasonable prospect of doing a global if the parties, Continental and Fibreboard, would agree on a trilateral. And that agreement was important enough to Fibreboard to make it give on some important points in the trilateral.

* * *

TESTIMONY OF HARRY WARTNICK

[Commencing at page 643]

* * *

You also have heard testimony from Mr. Snyder, have you not, on the subject of Fibreboard's litigation with its carriers?

A. Yes, I have.

Q. Did you follow that litigation?

A. Yes, I did.

Q. And were you aware of the status of that litigation as we approached the year 1991?

A. I've been generally aware of it since the mid-1980s. I actually

attempted to intervene a plaintiff into that litigation back in 1983-1984, sometime in that general time period, and I have followed it generally ever since.

Q. How did you follow it, sir?

A. I was in San Francisco, I paid attention to what was going on at the courthouse. When the various tentative decisions came down from Judge Brown, I obtained copies of it. We obtained copies of the judgment. And when the case went up on [644] appeal, we obtained copies of the various briefs and generally made an effort to keep abreast of what was occurring.

* * *

TESTIMONY OF STEVEN KAZAN

[Commencing at page 903]

* * *

Q. And if I were to ask you the same question about the time course of the Fibreboard insurance litigation, did you follow that as well?

A. I also followed it. I'm not sure I followed it quite as well as Mr. Wartnick did. But, yes, I was aware of it, read the opinions, read the briefs, kept current on what was going on, talked to people at Brobeck about it and so on.

* * *

[911] * * *

Q. Do you have a view that you can offer to the court about whether or not you think the Ahearn settlement is fair?

A. Certainly I do have a view.

Q. Please tell the court.

A. I think it's a very fair settlement, certainly for the members of the Ahearn class.

Q. Why is that, sir?

A. Because in the context that we were dealing with from the start in 1991 and up through the time that the agreement was reached in 1993, just focusing on that period, there was very grave risk involved for members of this class. Fibreboard was a small company that was very important in certain areas of the country and, as Mr. Snyder explained, through the ACF, became increasingly prominent in other areas of the country. It was a company that was effectively swamped by its asbestos exposure. The best illustration of that is this is a company that had around 4 million shares of common stock and at a relevant period it was trading at two, three, four [912] dollars a share. The market was valuing this company at 10 or 15 million dollars when it had assets, as we've heard here, that place it in the 200, 250 million-dollar range, net of asbestos exposure. It had run through most of its insurance coverage, it had left its insurance claims in the California courts and if it lost is coverage, it was all over. If it won its coverage, in my view, it was still all over, but it would have been a slower and more painful death. The risk involved with the insurance coverage litigation was, in my view, very substantial. I don't know that I could have articulated it with quite the elegance of Justice Kaufman, you know, but he was one of the guys at the time who was on the court, and we knew that there was a good result in the trial court, we were optimistic about the intermediate appellate court, although clearly there was substantial risk there, and frankly although we tried not to show it we were scared to death about the California Supreme Court. So there was a very great risk, as we saw it — as I saw it. . . .

Appendix B

* * *

TESTIMONY OF MEYER G. KOPLOW

[Commencing at page 1325]

* * *

Q. Now, would you — at the time when our firm was called in on this in February, when you started to become involved, just to — we've heard Mr. Snyder's testimony as to what he was trying to do, and I'm going to essentially ask you whether the reciprocal was — what the situation was facing Continental. Is it correct that you had had this massive assignment program where tens of thousands of cases had been reported to be settled by Fibreboard essentially using Continental's money and without Continental's consent?

A. Yes, there was such a massive assignment program.

Q. And is it correct that based on what we were advised by those who had been long involved in the situation that the values on these settlements had been very much escalating?

A. Yes, that's correct.

* * *

[1326] * * *

Q. Is it correct that the judicial decisions which had been rendered were not going particularly well for Continental, that Continental had lost its punitive damage case in the Ninth Circuit, Continental had lost the Andres assignment case on the right to assign in the trial court in California?

A. That's also correct.

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Q. Now, we did understand that that was not a res judicata procedure, is that correct, in the California procedure?

A. That's right.

Q. And was it also the case that Continental had attempted to take a writ of mandate and get an immediate review of that Andres decision from the California court of appeal and had failed in that attempt?

A. I believe that's what I was advised at the time.

[1327] Q. And as has been testified by all the witnesses, Continental was then faced with the lawsuit brought against it by Fibreboard in this court, by Fibreboard with the plaintiffs allied with Fibreboard who were representing to the court in substance that they had been successful in achieving a settlement of tens of thousands of asbestos cases and that all that was needed to finalize that settlement was for the court to agree with the Andres court that such assignments were indeed valid, that the amounts were reasonable and that it was appropriate to put — to issue a bar order of contribution against Pacific? Is that correct?

A. I believe it to be correct. It was about 20,000 cases at the time.

Q. With the provision for more being added?

A. Well, more were added over time.

Q. And this, as you understood, was a court which had considerable familiarity with asbestos cases and in Cimino had seen values far higher than the values that were in the Ness Motley 1 agreement; is that correct?

A. That was my understanding.

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* * *

[1328] * * *

Q. Now, did we then learn or did Continental then learn — I'm not limiting my question to the law firm — was Continental then apprised that [1329] Fibreboard was proposing to enter into a multi-billion-dollar global by way of assignment of all of its cases, class action, presents, futures with the plaintiffs?

A. Yes.

Q. And assuming that the assignments were valid, assuming there was a loss of the coverage case, then were that to happen Continental would have been forced to write checks for billions of dollars under an agreement as to which it had had no say on the terms and was facing the prospect of not being able to get even contribution from Pacific in that situation; is that correct?

* * *

[1376] * * *

Q. And was there then exploration and discussion between Continental and Fibreboard as to the possible [1377] negotiation of a bilateral agreement?

A. Yes, there was.

Q. Would you recount it?

A. We held several meetings with the Fibreboard representatives during the month of June 1993 that were for the purpose of seeing whether we could reach a bilateral agreement that did not include the plaintiffs. There were meetings in New York, there were some limited discussions in Washington, and you may recall that on June 30th, you and I attended a meeting at

Appendix B

the Brobeck offices in San Francisco with a number of members of the Brobeck firm and with Michael Douglas, the general counsel of Fibreboard, in an effort to see whether we could reach agreement on a bilateral.

Q. What were the outcome of those discussions?

A. If I might, I'd like to — I'd just like to interject something to pick up a thread that was left hanging from something I said earlier.

Q. Sure.

A. Part of the — part of the thought in starting to discuss a bilateral was the hope that we could get the plaintiffs interested in something back to the table on a global. When that was reported to the plaintiffs, their attitude was basically, "That's [1378] fine with us; go ahead and reach a deal with Fibreboard. That would be perfectly okay."

We had a very difficult meeting on June 30th. There had been a lot of difficult meetings in this matter, but this one would rank right up there as a candidate for the most difficult meeting that we had. We were not close on price, we were not close on any other terms. It became very clear to us during the course of that meeting that it was going to be nigh onto impossible to reach a bilateral deal with Fibreboard. We had the Pacific Indemnity problem; that is, that we weren't prepared to lay out billions of dollars without an acceptable level of contribution from Pacific. The Fibreboard appreciation of a bilateral was that if they could not turn around and use the money to achieve a — a settlement, a global settlement with the plaintiffs, they would be left with the obligation of providing their own defense from — from these funds, and they told us that that was going to be a very significant cost. And I got the very definite impression that the Fibreboard side was not in agreement as among themselves as to whether or not a bilateral agreement was something that

was in the best interests of Fibreboard, and came away with the conclusion not [1379] only that it would be a long time before we could put some of the people who had been in the room back in a room together again given — given what had taken place that day, but also that there were people on the Fibreboard side who simply would — would never agree to — to the kinds of numbers that Continental might consider paying on a bilateral.

Q. . . . Do you have a view as to whether there was ever a prospect of successfully negotiating an independent bilateral or trilateral agreement with Fibreboard at a price — well, at the price which is in the trilateral agreement?

A. I don't believe that we could have — that we could have achieved that. We had extraordinary difficulty getting to a trilateral agreement, first in concept after the price parameters we thought had already been set, and then we had tremendous difficulty in getting from an agreement that had been [1380] achieved in principle in New Orleans on September 9th to a documented agreement which didn't get completed until more than a month after that. So I — my own personal view is that but for the plaintiffs having imposed this condition upon us as something that we would be required to achieve before they would ever agree to document a global and work out the rest of the terms and conditions beyond the price term that would be necessary was that there was no chance of achieving a separate bilateral or trilateral agreement with — with Fibreboard.

* * *

[1398] A. What was going on in the first 10 days of July was, as I mentioned, we had gotten close on Ness Motley, close on the price, close on the cash component, and although there were still other terms of the agreement to be worked out, those were the places we had to start. Judge Higginbotham was putting pressure on to try to get to some agreement between Continental and Pacific. And as I said, we had — we had had a horrible

meeting on June 30th about a bilateral. We were due to meet with Judge Higginbotham and the Fibreboard folks and Ness Motley I believe around July 13th. And just before that meeting, we received a letter from Fibreboard that appeared to us to be setting Continental up for a bad-faith claim in the event that global negotiations were unsuccessful.

Q. This is the July 9, 1993 letter?

A. That's the July 9, 1993 letter.

* * *

[1504] * * *

A. . . . At the same time — at the same time, there were other problems that presented themselves that we hadn't anticipated on August 26th when we struck this deal. One of the problems that the court [1505] and counsel would be familiar with is the fact that some 4,000 Baron & Budd claims got filed on August 27th with the claim that they were present claims, not futures. . . .

No. 97-1695 and 97-1704

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

IN RE ASBESTOS LITIGATION:

JAMES FLANAGAN AND DAVID H. MIDDLETON,

Petitioners,

v.

GERALD AHEARN; JAMES MCADAMS DENNIS; CHARLES W. JEEP; JAMES DRAKE; JUANITA DRAKE; JAMES ELLISON; ROLAND DEARBORN; JUDITH DEARBORN; KERWIN BUTCHER; DIR., WORKERS' COMP., DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR; PAUL COCHRAN; IDA BECK; MARION BEHEE; LONGSHORE, INTERVENOR; WILLIAM JAMES MITCHELL; FIBREBOARD CORPORATION; BETHLEHEM STEEL CORPORATION; CONTINENTAL CASUALTY COMPANY; PACIFIC INDEMNITY; FRANCIS McGOVERN; OWENS-ILLINOIS, INC.; PENN MUTUAL LIFE INSURANCE COMPANY; COLUMBIA CASUALTY COMPANY; CNA CASUALTY COMPANY OF CALIFORNIA; CELOTEX CORPORATION; DANIEL HERMAN RUDD, JR., ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED; JOHN HANSEL, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF PETITIONERS FLANAGAN AND MIDDLETON

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REPLY BRIEF OF PETITIONERS FLANAGAN AND MIDDLETON

NOW COME James Flanagan and David H. Middleton, Petitioners in Docket No. 97-1695, and present their Reply to the Briefs filed by various Respondents in opposition to their petition, as well as the petition filed by Esteban Ortiz, et al., in Docket No. 97-1704.

PREFACE

The Proponents of the Global Settlement urge most strenuously that *Ahearn* is one-of-a-kind, and that this Court ought to handle the matter in a pragmatic way and, by denying the instant petition for certiorari, allow the settlement to stand, even if it is violative of the principles laid down in *Amchem*. Effectively, the Proponents suggest that in the guise of expediency this Court ought to suspend the operation of its own precedent. The suggestion is tantamount to urging the Court to engage in an unscrupulous undertaking. This Court never suspends operation of one of its own precedents. With that, the underscoring point is made; the underpinning reasoning of the *Ahearn* Proponents is not only flawed, but is utter folly.

IT IS NOT THE PLACE OF A LOWER FEDERAL COURT TO "BEND" THE PRINCIPLES ENUNCIATED BY THIS HIGHEST COURT.

In his dissent in *Northern Securities Co. v. United States*, 193 U.S. 197, 400-01 (1904), Justice Holmes wrote:

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

To the extent the principles of class action law were not clear prior to *Amchem Products, Inc. v. Windsor*, 521 U.S. ___, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997), those principles are now "well settled". It appears that the Fifth Circuit panel majority which approved the *Ahearn* Global Settlement in *In re Asbestos Litigation [Ahearn I]*, 90 F.3d 963 (5th Cir. 1996) and *In re Asbestos Litigation [Ahearn II]*, 134 F.3d 668 (5th Cir. 1998) was suffering from those very "appeals to the feelings" – a sense that the Global Settlement is a deal which ought to be pushed through at all costs. This Court warned in *Amchem* that "the standards set for the protection of absent class members serve to inhibit appraisals of the chancellor's foot kind – class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness." *Amchem*, 117 S. Ct. at 2248.

Indeed, Petitioners can only conclude that some consideration – whatever it may have been – competing with the lower court's duty of fidelity to the holdings of this Court "distort[ed] the judgment" of the Fifth Circuit panel majority.

The striking similarities between *Amchem* and *Ahearn* were, no doubt, central to this Court's issuance of a "GVR" order mandating further consideration on remand. Still, the Proponents of the Global Settlement distinguished their position by posturing a distinction without a difference. Witness the first sentence of their brief where the class representatives reason lamely:

> This is the *Ahearn* case not the *Amchem* case . . .

Continental likewise urges that the *Ahearn* Global Settlement is not a "carbon copy" of the *Amchem* Settlement. See also Continental's Brief, p. 5 (claiming that Petitioners "pretend that this case is *Amchem* itself").

The "carbon copy" argument is absurd. History teaches that no two events are exactly the same. Jurisprudence similarly recognizes that no two cases are precisely the same. The question an orderly system of jurisprudence asks is:

> *Is there sufficient similarity – in material aspects – between the case at bar and the prior case enunciating a general principle, that the principle of the prior case must be followed?*

As the highest tribunal in the land, this Court sits to announce *principles* of general application, not to make ad hoc proclamations with exclusive applicability to the precise facts before it.[1] (Were the latter so, the Court might just as well close its doors.)

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[1] As Petitioners pointed out in their Petition, common-law courts do not issue their decisions with the caveat that "This rule holds only to redheaded Walpoles in pale magenta Buick cars." *Bhandari v. First National Bank of Commerce*, 829 F.2d 1343, 1352 (5th Cir. 1987) (Higginbotham, J., concurring opinion,

IF LEFT UNCORRECTED, THE FIFTH CIRCUIT'S DECISION SETS THE STAGE FOR MORE *AHEARN* CLONES.

Two of these things go together,
Two of these things are kind of the same.

– Preschooler's song from *Sesame Street*

"Unique facts, unique facts": This is the siren song the Proponents of the *Ahearn* Global Settlement sing to this Court[2], urging that those facts will never be repeated, and hence, the Fifth Circuit's *Ahearn I* and *II* decisions are fated to gather dust as forgotten pages of the Federal Reporter.

In the first sentence of their Brief, the Insurers Continental, et al. , urge that *Ahearn* is "a *sui generis* case". "*Sui generis*" is defined variously as "Of its own kind; peculiar, unique." (The New Shorter Oxford English Dictionary 3135 [1993]); "Of its own kind or class; i.e., the *only one* of its own kind; peculiar." (Black's Law Dictionary 1286 [5th ed. 1979], emphasis in the original).

Laying to one side the question of whether a case which commenced not with the filing of a complaint[3], but with a barbeque at a judge's home is "peculiar", we consider whether *Ahearn* is a jurisprudential Paris Original, never-to-be-repeated, "the *only one* of its kind". The

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quotation attributed to Karl N. Llewellyn, *The Bramble Bush* [1960]).

[2] Counsel for the *Ahearn* Class are singing for a handsome supper, indeed: An award of attorney's fees in excess of $46 million is riding on this Court's decision whether to strike down or uphold the *Ahearn* Global Settlement.

[3] See Fed. R. Civ. P. 3.

Proponents of *Ahearn* have forgotten that, by virtue of being subject to American law, they are citizens of a jurisprudential universe governed by precedent. Now that *Amchem's* cogent teachings have become part of the *corpus juris*, lawyers and judges bound thereby will analogize to, or distinguish from, the facts of *Amchem*. This is not an inquiry we embarked upon for the first time in law school; indeed, at our mother's knee we start learning that "Two of these things are kind of the same".

Petitioners submit that, outside the ivory-tower world of legal sophistry, any honest, sensible, reflecting individual could not but conclude that not only are *Amchem* and *Ahearn* "kind of" the same; they are very much the same. This Court did not send the cause back for further consideration so that the lower tribunal could congratulate itself on the perfection of its initial reasoning. The Court issues a GVR order "[w]here intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration. . . . " *Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

The Proponents of *Ahearn* are fooling no one. Defendants in mass-tort cases are even now crossing their fingers in the hope that this Court will deny certiorari and thus carve out the Fifth Circuit as a safe harbor in which they can force "unitary" settlements upon injured persons. As the Dissent wrote in *Ahearn I*:

> This case is extraordinarily important. Prior to the filing of this suit, no one had ever attempted a no-opt-out, mass-tort, settlement-only, futures-only class action. Ever since the district court's certification order, however, corporate America

has been "anxiously awaiting" a decision in this case. Richard B. Schmitt, *The Deal Makers: Some Firms Embrace the Widely Dreaded Class-Action Lawsuit*, WALL ST.J., July 18, 1996, at A1. The majority's unequivocal approval of Fibreboard's litigation strategy undoubtedly will lead "other financially threatened companies throughout the nation [to] utilize it as a road map for sheltering their assets and improperly restricting the rights of their present and future victims." [citation omitted]

Thus, th majority's reliance upon the "unique facts" of this case, *see* maj. op. at 993, is ironic: The unique fact of the insurance dispute is simply irrelevant, and the other unique facts – a corporate defendant's hand-picking class counsel, cutting a side deal, reaching a "global settlement" affecting only "future" plaintiffs, and choosing a sympathetic judge to approve the settlement – likely will become far too common now that the majority has approved of them.

Ahearn I Dissent, 90 F.3d at 994 (Smith, J.).

THE *LIGGETT* DECISION BELIES THE ASSERTION THAT *AHEARN*'S "UNIQUE FACTS" WILL NEVER BE REPEATED.

Incredibly, Continental asserts a "lack of any conflict among the lower courts as to [*Amchem's*] meaning" (Continental's Brief, p. 2). If left uncorrected by this Court, other toxic-tort defendants are as certain to follow the aberrational precedent of the *Ahearn I* and *II* decisions as "a flock of sea gulls follows a lobster boat." *United States v. Barnes*, 604 F.2d 121, 175 (2d Cir. 1979) (Oakes, J., dissenting).

This is abundantly shown by the decision *Walker v. Liggett Group, Inc.*, 175 F.R.D. 226 (S.D.W.Va. 1997). The court in that case, "one of the first of many that will interpret *Amchem*," had no difficulty in holding, in essence, that *Amchem* means what it says.

The proposed settlement in *Liggett* was drawn in the same "total peace" pattern as *Ahearn*.[4] In *Walker*, class plaintiffs and the defendant (a cigarette manufacturer) sought to certify a non-opt-out class under Rule 23(b)(1)(B) for settlement only. The settling parties claimed that "Liggett is in dire financial condition and facing a crush of pending litigation." 175 F.R.D. at 228. Liggett "entered into a comprehensive settlement agreement with Plaintiff and the putative class." *Id.* Like *Amchem* and *Ahearn*, the class was "nothing short of enormous." 175 F.R.D. at 229. Liggett sought an injunction to prevent further smoking-related litigation against it. *Id.* Prior to the issuance of this Court's *Amchem v. Windsor* decision, the District Court granted preliminary certification and preliminary approval of the settlement.

Upon issuance of this Court's *Amchem* decision, the District Court did a prompt about-face, setting aside the class certification. The court observed that *Amchem* "rests on two independent pillars: the predominance requirement of Rule 23(b)(3) and the adequacy-of-representation

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[4] *Walker v. Liggett Group* illustrates a central problem with the Fifth Circuit's *Ahearn I* and *II* decisions, which upheld the Global Settlement based on the alleged "unique facts" of the case. In a judicial system governed by precedent, the supposed "unique facts" become a blueprint for the creative lawyer. The "unique facts" are largely in the eye of the beholder.

standard of Rule 23(a)(4)." *Liggett*, 175 F.R.D. at 230, n.6 (citing John C. Coffee Jr., *After the High Court Decision in Amchem Products Inc. v. Windsor, Can a Class Action Ever Be Certified Only for the Purpose of Settlement?*, National L.J., July 21, 1997). The requirement of adequate representation is "an absolute prerequisite". *Id. Accord, Liggett*, 175 F.R.D. at 231 (adequate representation a "bedrock" consideration in considering propriety of class certification); 175 F.R.D. at 233 ("Rule 23(a)(4) must be satisfied for any proposed limited fund class, regardless of perceived notions of equity.")

In *Liggett* it was argued that because of the limited availability of funds to pay claims, the currently injured were in the same position as future victims. The Court rejected that argument:

> In reality . . . the alleged limited fund exacerbates the apparent conflicts creating what has been described as a zero-sum game.

Liggett, 175 F.R.D. at 231, n.8.

Despite its earlier approval of the non-opt-out, limited-fund settlement, the Court was unable to see any honest, good-faith way to distinguish *Amchem* from the case before it, and accordingly granted the Intervenor-Objector's motion to set aside the class certification: "While the parties differ in their reading of the Supreme Court's intentions, the bedrock similarity between *Amchem* and the instant case is manifest . . . " *Liggett*, 175 F.R.D. at 233.

The parties in *Liggett* filed suit without benefit of this Court's June, 1997 *Amchem* decision. Should this Court deny certiorari in this case, future *"Ahearns"* or *"Liggetts"*

will be filed in the hospitable Fifth Circuit – the only jurisdiction in which *Amchem* does not mean what it says.

CONCLUSION

These Petitioners submit that "the bedrock similarity between *Amchem* and the instant case is manifest . . . " *Liggett*, 175 F.R.D. at 233. The principles laid down in *Amchem Products, Inc. v. Windsor* require that the Fifth Circuit's approval of the *Ahearn* Global Settlement be set aside.[5]

DATED at Detroit, Michigan this 26th day of May, 1998.

Respectfully submitted,

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[5] The deeper we delve into the issues of this cause, the more it is recognized that the position enunciated in the dissenting opinions by Judge Jerry Smith in *Ahearn I* and *II* is not only cogent, but indeed compelling.

(9)

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In the
Supreme Court of the United States

OCTOBER TERM, 1997

ESTEBAN ORTIZ, *et al.*,
Petitioners

v.

FIBREBOARD CORPORATION, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR THE PETITIONERS

1. Rule 23(a) Certification. Respondents concede that, as this Court held in *Amchem Products, Inc. v. Windsor*, 117 S.Ct. 2231, 2249 (1997), the certification inquiry under Rule 23(a) must focus on the legal and factual questions that qualify each class member's case as a justiciable controversy, questions that must preexist any settlement. Br. of Class Counsel (Class Br.) 9. Yet as the Petition showed, Pet. 7, 10-13, the courts below applied a conflicting rule for class certification. The respondents accuse us of "unfairly tinkering" with the Fifth Circuit's opinion to conjure what they admit would be an issue worthy of plenary review. Br. of Continental Cas. Co., *et al.* (Ins.Br.) 15. But they simply refuse to take the Fifth Circuit at its word, and ignore that court's own, explicit explanation for its decision. The court of appeals said that the district court did not err by considering "the evidence adduced at the fairness hearing in making findings under Rule 23(a)." App. 54a. The court said that the common and typical "questions of law or fact" may be "derived from the settlement rather than from the [plaintiffs'] complaint." App. 56a-57a. And the court expressly affirmed class certification on the basis of "issues [held] in common under the settlement." App. 57a. Petitioners did not make those words up. Indeed, this Court read the Fifth Circuit's decision precisely the same way in *Amchem*, which was the basis for the Court's GVR order. *See* Pet. 11-12. The Fifth Circuit's holding on remand that "nothing in the *Amchem* opinion ... changes our prior decision" (App. 2a) is nothing less than a refusal to apply the law laid down by this Court and warrants summary reversal.

But there is ample reason to give this case plenary review because the corruption of Rule 23 wrought by the decision below is even more subversive than that condemned in *Amchem*. The Respondents repeatedly tout the "legal and factual questions presented by the insurance disputes" between Fibreboard and the Insurers and insist that it was by "reference to *these* legal and factual disputes that the Fifth Circuit determined satisfaction of the 'commonality' and 'typicality' requirements of Rule 23(a)." Class Br. 9 (original emphasis); *see also* Ins.Br. 2, 8, 9; Fibre Br. 20, 26.

For once everyone is in total agreement. But the problem is that the legal and factual questions raised in the insurance coverage litigation are presented *not* in *this* case, but in two *other cases* — the state court coverage litigation in California and the *Rudd* class action brought by the Insurers to lock in the Trilateral Settlement.

Respondents note that the plaintiff class's stake as potential beneficiaries of Fibreboard's liability insurance policies was "referred to in the complaint" in this case, Fibre Br. 20 (citing App. 556a-559a) — but those "references" were mere background, not the requisite "'claims or defenses that can be raised in courts of law as part of an actual or impending lawsuit.'" *Amchem*, 117 S.Ct. at 2249 n.18. The complaint's actual *claims*, App. 560a-564a, were *personal injury tort claims brought against Fibreboard*, not insurance coverage third-party beneficiary claims brought against the Insurers. Thus the legal issues that, according to the Respondents and the court below, supposedly furnish the requisite commonality and typicality under Rule 23(a) for this class certification involve *not* the claims alleged in this class action, *but the claims in another lawsuit.*

To be sure, the class wanted Fibreboard to win its coverage dispute. And, to help Fibreboard do so, perhaps, as Class Counsel now suggest, Class Br. 9, the class could have intervened in the insurance coverage case (on Fibreboard's side of the docket) in California state court. And, following any settlement of the coverage case, perhaps the plaintiff class (rather than the Insurers themselves, as actually happened) could have instituted its own *Rudd*-style class action seeking a declaration of the plaintiffs' rights under those policies and any settlement thereof.[1] But none of that speaks to the decision of the courts below in certifying *this* class action, which pleads (and releases) personal injury tort claims against Fibreboard.[2] A commonly held interest as contingent third-party beneficiaries in the settlement of an insurance coverage dispute being litigated in a

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[1] As Respondents admit, Fibre Br. 17, the coverage dispute was resolved in the *Rudd* litigation, which approved the Trilateral Settlement and discharged the Insurers from further obligation under the policies. It is uncontested that the defendant class of asbestos claimants in *Rudd* was properly certified under Rule 23(b)(2) on the basis of each class member's identical, inter-dependent claim to declaratory relief determining their rights under the insurance polices as potential tort victims. App. 93a n.20; *see also Continental Cas. Co. v. Rudd*, Findings of Fact ¶ 118; Conclusions of Law ¶¶ 18, 26, 36; Fibre Br. 13a-15a.

[2] Indeed, when they retreat and protest (twice) that the class "*could* have" litigated the class interest in the coverage dispute in a different class action, Class Br. 9, 28 (emphasis added), Class Counsel effectively concede that those claims were not in fact pleaded or litigated in this case, and therefore cannot serve as the basis for certification of this asbestos personal injury class action.

California state court cannot possibly fulfill the Rule 23(a) prerequisites for certification of a separate personal injury class action pending in a federal court in Texas.

In *Amchem,* the settling parties at least limited themselves to trying to bootstrap class certification on the basis of the settlement in their *own* action. But the courts below and the settling parties here have transcended the boundaries of space and time in trying to certify a class based on the pleadings and issues addressed in a separate lawsuit. If such remote extrinsic matters are sufficient to meet the requirements of Rule 23, then that rule would appear to have no limits left at all.

2. Rule 23(a)(4) Conflicts. Like the court of appeals below (*see* Pet. 14), the Respondents do not really try to demonstrate that there is no conflict within the class between future claimants and the presently injured. The Respondents concede that the Global Settlement's Trust Distribution Process (TDP) limits and allocates recovery for asbestos injuries in order to "ensure the availability of funds to pay ... the later-filed claims of exposure-only class members." Class Br. 14; Ins.Br. 13. Respondents defend the TDP's restrictions as necessary because the settlement fund "is not large enough to guarantee full payment over a period of many years for all the claims that class members might potentially assert against it." Class Br. 13. The trade-off between present and future asbestos claimants wrought by the settlement is put in stark relief by the Respondents' observation that, without the TDP's restrictions, the settlement would give currently injured class members "unlimited access to the insurance fund for their claims and the devil take the hindmost as to the rest of the class." Fibre Br. 22.

These points only confirm that, as this Court held in *Amchem*, the currently injured and exposure-only claimants have diverging interests. Pet. 13-14. Yet these groups were not separately represented here by their own sub-class plaintiffs and counsel. Respondents' frequent cries that the Global Settlement is fair "from the standpoint of the class as a whole," Fibre Br. 22, and that its benefits for the class "'overwhelmed'" and "'outweighed'" the "'divergent'" interests within the class, simply repeat the error of the court below. Ins.Br. 17, 13; Class Br. 11-13. The fairness of the settlement is the standard for approving a settlement under Rule 23(e), *not* for addressing conflicts within the class under Rule

23(a)(4). This categorical distinction "serve[s] to inhibit appraisals of the chancellor's foot kind — class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness." *Amchem*, 117 S. Ct. at 2248. Rule 23(a)(4) mandates "structural assurance" of fair representation for diverse interests, 117 S.Ct. at 2251, because it is concerned not with the merits of the trade-offs created by a settlement, but with whether the class representatives and class counsel *had authority to trade at all.*

In *Amchem* this Court squarely rejected the dissenting view that a discrete settlement fund in a 23(b)(3) class action empowers a court to ignore intra-class conflicts in favor of judicial oversight that can supposedly manage and reconcile the competing interests without benefit of the structural assurances of fairness provided by sub-classing. Pet. 14-15. Yet the court below embraced precisely that discredited theory in a 23(b)(1)(B) action in which the limited fund (the supposed basis for class treatment) makes the trade-offs within the settlement all the more acute. If left standing, the decision below promises to gut *Amchem*'s and Rule 23's protection of absent class members.[3]

3. Rule 23(b)(1)(B) and the Rules Enabling Act. The Respondents do not dispute that the Rules Enabling Act was a central element of this Court's GVR order to the Fifth Circuit or that the court below ignored this issue on remand. Nor do they contest that the substantive law applicable to the personal injury claims pleaded and released in this diversity class action is state law. Most important, Respondents concede that the very purpose of the class certification here pursuant to Rule 23(b)(1)(B) was to abridge those state law rights "by limiting class members' rights to obtain immediate and full payment of their individual state law claims."

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[3] Class Counsel ultimately recognize the conflict and retreat to the position that any conflict within the class does not require decertifying the entire class and vacating the approval of the settlement, but at most justifies remanding for the creation of subclasses to renegotiate the details of the TDP. Class Br. 14. But the extent to which the conflicts infected the entire Global Settlement is unknowable at this point, App. 181a, and if such an attempt to unbake the class action cake were an adequate remedy, that step would have been ordered by the Third Circuit and this Court in *Amchem*, where the very same intra-class conflict was found. Conflicts under 23(a)(4) taint the class certification *ab initio*, and the only proper course is to decertify the class and leave the parties, if they wish, to start over.

Class Br. 20.[4] No opportunity was afforded to opt out of this 23(b)(1)(B) class, so the abridgment of the absent class members' rights was compulsory. Such modification of a class member's substantive rights without his consent through application of a procedural rule is forbidden by the Rules Enabling Act.[5] The underlying substantive rights of *in rem* claimants are *already* limited by any competing claims against the same *res*. Therefore, a mandatory class action encompassing all competing claims does nothing to alter the substantive rights of class members holding only such common claims against a *preexisting* limited fund. By contrast, outside of bankruptcy, the substantive law does not allow courts to limit individual plaintiffs' independent, *in personam* recoveries in order to ensure that money will be left for later-suing persons. Here there was no receivership, no bankruptcy, no preexisting *res* or limited fund to restrict the class members' right to collect the entirety of any tort judgment against Fibreboard. Here the "limited" fund was merely an artifact of the settling parties' negotiating postures.[6]

---

[4] It is hornbook law that the "first and most obvious consequence of a judgment" is that it immediately "confers upon the successful party the right to issue execution or other process of the court for its enforcement." *Clarke v. Brown*, 244 A.2d 514, 518 (N.J. Super. 1968). As Justice Scalia has noted, this familiar common law rule sometimes results in a race to the courthouse that, unremarkably, leaves later judgment creditors empty-handed. Pet. 16. If Respondents prefer a different rule, they can resort to bankruptcy or seek legislative relief from Congress.

[5] Moreover, the abridgment of personal injury claims through a federal rule goes beyond federalism to implicate due process. Hence this Court's suggestion that there is "a substantial possibility" that class actions "seeking monetary damages" cannot be certified under Rule 23(b)(1) because it permits no opt-out. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994). *See* Pet. 22-25.

[6] Respondents spend a lot of time discussing the ancient distinction between law and equity, Ins.Br. 22-23, but none of their authorities provides anything remotely like precedent for limiting independent personal injury claims on the basis of the contrived "limited fund" at issue here. The cited reference to Justice Story's COMMENTARIES analyzed not *in personam* claims for money damages, but bankruptcy-like proceedings with a preexisting fixed *res*, where creditors sue to divide up the debtor's estate and "the whole administration and settlement of the estate is assumed by the court." COMMENTARIES ON EQUITY PLEADINGS, § 99 (9th ed. 1879). Respondents also cite Prof. Chaffee's discussions of suits at law involving rights held in common to a preexisting *res* (e.g., a bank in receivership,

Respondents do not deny that Congress has provided, within the bankruptcy code, special statutory relief for asbestos manufacturers overwhelmed by present and anticipated future tort liabilities, or that the courts below deliberately set out to craft a supposedly superior alternative to bankruptcy. Pet. 21 & n.11. Their only answer is that bankruptcy was not an option in this case because Fibreboard was *unwilling* to go that route. Class Br. 25; Ins.Br. 23; Fibre Br. 25. That argument, of course, proves our point: Why should Fibreboard, or any other rational actor, *ever* swallow the tough medicine of Chapter 11 if it can convince a federal court to concoct, out of a procedural rule, an end-run around bankruptcy law that resolves its tort liability while leaving all of its equity intact and safe from tort creditors?

Although the Respondents protest that the basis for class certification in this case was "not, as in *Amchem* ... a search for alternatives to the tort system," Ins.Br. 9, they nonetheless try to justify certification here by trumpeting the supposedly greater equity and efficiency of the Trust Distribution Process as compared with the "tort system" relief available to class members under the Trilateral Settlement approved in *Rudd*. Class Br. 5; Ins. Br. 10. But as this Court explained in *Amchem*:

> The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution. And Rule 23, which must be

a "bankruptcy," or "a communal mill"). Z. Chaffee, SOME PROBLEMS OF EQUITY 151, 159, 285 (1950). But Prof. Chaffee acknowledged that class actions were historically limited to the *in rem* context, where "all the members are connected similarly with land or money within the jurisdiction." *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 297, 1308 (1932). "On the other hand, if the enjoined persons have special claims or liabilities, their rights are personal and cannot be concluded in their absence." *Id.* *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 298, 311-12 (1853), involved the division of shares of existing property held in common by the members of a religious association. All of the old English cases cited by respondents likewise involved claims held in common to a preexisting *res*, such as rights under a ship's articles to a privateering prize, rights under a previous decree to tithes from parishioners, rights to shares of property under a partnership agreement, or application of a tax to an annuity arising from a commonly held trust estate.

> interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load [the settling parties] and the District Court heaped upon it.

117 S. Ct. at 2252. Here, the settling parties have heaped upon Rule 23 a load at least as crushing as that in *Amchem*. Like the alleged efficiencies of the *Amchem* settlement, the purported superiority of the TDP is powerless to justify certification of this class action.

4. Due Process Right to Opt-Out. The Respondents do not dispute that the decision below presents the same due process issue that intrigued this Court in *Adams v. Robertson*, 117 S.Ct. 1028 (1997) (per curiam), and *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994) (per curiam). App. 81a-85a; 119a-133a. They claim only that this case is distinguishable because affording opt-out rights here would have prejudiced Fibreboard's ability to settle its insurance coverage litigation. Ins.Br. 25; Fibre Br. 26. Whether such extrinsic factors affecting a defendant's settlement negotiations in a separate lawsuit can constitutionally justify stripping plaintiffs of their due process rights is surely a question worthy of plenary review.

5. Notice. Respondents do not contest that "class action notice sufficient under the Constitution and Rule 23" can probably never be given to "legions" who have "no perceptible asbestos-related disease at the time of the settlement" and who "may not even know of their exposure." *Amchem*, 117 S.Ct. at 2252. They answer only that such meaningless and ineffective notice is all that is required by the Constitution in a mandatory class action, citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Fibre Br. 27; Ins. Br. 27-28. But *Mullane* involved a statutory state judicial procedure for pooling small preexisting trusts for administrative efficiency — a step that did not reduce any trust beneficiary's stake, 339 U.S. at 308-309 — and individual notice was easily sent to most of the beneficiaries along with their regular trust fund checks, *id.* at 318. It is a question worthy of this Court's plenary review whether *Mullane* sanctions a federal class action resolving hundreds of thousands of individual and independent future state-law personal injury claims when effective notice to a class "so unselfconscious and amorphous" is impossible. 117 S.Ct. at 2252.

6. Justiciability. The courts below openly conceded that the personal injury claims upon which jurisdiction is founded in this case

were a pretext that the parties never intended to litigate. Pet. 27. *Respondents unanimously agree*. Abandoning their own sham pleadings, the plaintiffs and defendant now say that Art. III jurisdiction and standing are predicated on the class's "interest in the outcome of an existing [insurance] coverage dispute" — "an interest [that] was pleaded in the complaint (App. 556a-559a)." Class Br. 28; Fibre Br. 28. But as explained *supra*, page 2, that "interest" was mentioned in the complaint as *background* material. It was not and could not have been *pleaded as a justiciable claim* because — as Respondents admit, Class Br. 28 — the insurance dispute was actually pleaded and litigated *not in this case*, but in the California state court case, and the fairness of the settlement of that dispute was then litigated as a declaratory judgment in *Rudd*.

Class Counsel ask this Court to pretend that this asbestos tort class action is really an insurance coverage case in disguise, insisting that "they *could have* properly litigated that interest" and "*could have* proceeded as a mandatory" class action on that issue. Class Br. 28, 29 (emphasis added). Evidently it's all the same to the Respondents, since the pleadings and this lawsuit are a charade in any event. But the legal claims that founded jurisdiction in *Rudd* to adjudicate the rights of the class against the Insurers simply cannot provide jurisdiction here to resolve the personal injury tort claims that the class holds against Fibreboard.[7]

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[7] Class Counsel suggest that this Court can cure their failure to allege genuine, justiciable claims by "deem[ing] the pleadings amended to conform to the matters raised and the evidence adduced at the fairness hearings," pursuant to Fed.R.Civ.P. 15(b) and 28 U.S.C. § 1653. Class Br. 29. That is absurd. (1) Respondents' problem is not that, by some oversight, they carelessly pleaded a "defective allegation of jurisdiction," § 1653. The problem is that the pleadings were a sham and this is a feigned case. (2) The coverage dispute that they say they "could have" pleaded and then litigated at the fairness hearing was *not* in fact litigated at that hearing, so there is nothing to which the defective complaint can be "conformed." Indeed, the very purpose of that proceeding (and of the Global Settlement itself) was to *avoid* a judicial decision on the coverage issues. (3) Even if this Court were to pretend that the hypothetical claims involving the class interest *in favor* of insurance coverage for Fibreboard had been alleged and proven, those claims would not enable the class to seek approval of the Global Settlement, because that settlement extinguishes entirely *different* claims — namely, the class members' individual personal injury claims *against Fibreboard*. *See* Pet. 12 n. 6.

The Respondents contend that the justiciability of collusive settlements was resolved long ago by cases like *Swift & Co. v. United States*, 276 U.S. 311, 326 (1928), Ins.Br. 28-29 & n.*; Fibre Br. 28. But as Justice Kennedy pointed out during argument in *Amchem*, those consent-decree cases involved an actual contemplated lawsuit and "an imminent litigable dispute" that would have transpired if the consent decree were not issued, Tr. Oral Arg. 32, whereas here *it is undisputed that the class never had any intention of litigating the class complaint, which was filed solely to provide the district court with a jurisdictional hook*. App. 52a.[8] Worse still, this farce was staged by the district court, Pet. 27-28 — a fact that the Respondents do not even try to dispute.

Ultimately, Respondents retreat to the desperate plea that this case *must somehow* constitute a justiciable controversy because it "resulted in a massive transfer of wealth from two insurers to a trust" set up to resolve tort claims. Fibre Br. 28. This confuses the size of government action with its form: Congress routinely appropriates billions to programs designed to provide relief to individuals, but its actions are still legislative — just like the settlement at issue here.

7. Respondents' Appeal to Practical Necessity. Respondents plead with the Court to preserve the Global Settlement as necessary to protect class members from losing their only chance at recovery against Fibreboard, because supposedly there would not have been any resolution of the insurance dispute absent the Global Settlement. That claim is both irrelevant and inaccurate. The peculiarities of the bargaining process between private parties plainly cannot give a federal court authority under Rule 23, the Rules Enabling Act, due process or Art. III to alter the substantive rights of class members or to exercise jurisdiction in a feigned case.

In any event, Respondents' assertion is belied by the express

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[8] If the defendants in those cases had not consented to the judicial approval of the decrees, the parties would have gone back to litigating against each other, because those cases involved continuing conflict over *future* misconduct by the defendants that had to be addressed by an injunction. *See Swift*, 276 U.S. at 326; *SEC v. Randolph*, 736 F.2d 525, 527-28 (9th Cir. 1984). The Chief Justice and Justice Scalia suggested in *Amchem* that the consent-decree cases may also be distinguishable because they were all government agency cases that preserved the rights of individuals injured by the defendant's conduct. Tr. Oral Arg. 27. *See, e.g., Rodgers v. U.S. Steel Corp.*, 536 F.2d 1001, 1003 (3d Cir. 1976).

terms of the Trilateral Settlement, which provides that it is independent and will be in force precisely if and when the Global Settlement has been *invalidated* and when Fibreboard therefore continues to be subject to asbestos claims in the tort system. App. 51a. If the Global Settlement fails, the insurers will pay Fibreboard $2 billion, which Fibreboard can then use — in addition to its own assets (valued at $515 million in its recent acquisition by Owens-Corning, Pet. 2 n.1) — to pay future and present unresolved asbestos-related claims. Furthermore, the Trilateral Settlement provides another $1.5 billion to pay Fibreboard's *past*, unpaid settlement obligations. Fibreboard's own counsel testified that the Trilateral Settlement was worth $3.35 billion. Tr. 604. The district court never found that the coverage dispute would not have settled but for the Global Settlement. It found (App. 279a-80a) that, as Fibreboard itself testified, Continental and Fibreboard were unable to reach a bilateral settlement of the coverage case in 1993 *only* because (i) CNA's offer was not high enough, and (ii) CNA wanted Pacific to contribute. The Global Settlement was not necessary to overcome either stumbling block.[9]

CONCLUSION

The petition should be granted and the decision below should either be summarily reversed (on the basis of the Fifth Circuit's refusal to apply *Amchem*'s holdings on Rule 23(a) certification and 23(a)(4) conflicts), or the case should be set for plenary review of those issues and of the dangerous precedent set by the Fifth Circuit on the issues of notice, justiciability, opt-out rights and the application of Rule 23(b)(1)(B).

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[9] Indeed, at the fairness hearing Fibreboard's counsel expressly *denied* that it was necessary to limit or extinguish the plaintiffs' asbestos claims against Fibreboard in order to settle the insurance dispute — the problem was the Insurers were not then willing to write "a big enough check." Appendix hereto 1a. He testified that, just a month prior to reaching the Global Settlement, Fibreboard had been willing to accept a $3.2 billion coverage settlement that would not have affected plaintiffs' tort claims at all, and that would have paid Fibreboard $150 million *less* than it ultimately received in the Trilateral Settlement. *Id.* Thus the restrictions on plaintiffs' tort claims in the Global Settlement are, by Fibreboard's own sworn testimony, entirely gratuitous.

Respectfully submitted,

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APPENDIX

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

TESTIMONY OF STEPHEN M. SNYDER, Esq., Counsel for Fibreboard Corporation

[Commencing at page 592 of the Joint Appendix in the Fifth Circuit:]

Q: [W]ould you agree with me, then, that it would have been impossible under that agreement for Continental to have settled their coverage in a way that would not have let — would not have extinguished all of the asbestos liabilities of Fibreboard?

A: No, that's not true at all.

Q: What would have been the circumstances where that could have happened?

A: I believe we had negotiations with them in 1993 whereby if they had written a big enough check we would have done just that.

Q: Okay.

A: Just didn't work, that's all.

[Commencing at page 605 of the Joint Appendix in the Fifth Circuit:]

Q: So you would have been willing to enter into a bilateral settlement with Continental in July [1993] for a little over $3 billion, a little over a hundred or two hundred million over $3 billion?

A: 3.2 or something like that.

(19)

No. 97-1704

FILED

AUG 6 1998

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the

Supreme Court of the United States

OCTOBER TERM, 1997

ESTEBAN ORTIZ, ET AL.,
Petitioners

v.

FIBREBOARD CORPORATION, ET AL.,
Respondents

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX
VOLUME I
(Pp. 1 – 374)

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Chronology of Fibreboard Asbestos Agreements 1043a

Settlement Averages by Currency - Includes Cimino 1046a

Settlement Averages by Currency - Excludes Cimino 1047a

Combination: Settlement Averages, Settlement Volume, Settlement Regime - With Cimino 1048a

Combination: Settlement Averages, Settlement Volume, Settlement Regime - Without Cimino 1049a

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE ASBESTOS LITIGATION

ESTEBAN YANEZ ORTIZ, EDEE COCHRAN,
LESTER E. TAYLOR,
JOHN ALLGOOD AND HENRY EVERS

Intervenors-Appellants,

v.

GERALD AHEARN, et al.,

Appellees.

No. 95-40635

RELEVANT DOCKET ENTRIES

DATE	FILINGS-PROCEEDINGS
January 27, 1998	Per Curiam Opinion of the United States Court of Appeals for the Fifth Circuit on Remand
December 3, 1996	Order Denying Application for Panel Rehearing of the United States Court of Appeals for the Fifth Circuit

November 26, 1996	Order Denying Suggestion for Rehearing En Banc of the United States Court of Appeals for the Fifth Circuit
July 26, 1996	Opinion and Order of the United States Court of Appeals for the Fifth Circuit

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF TEXAS, TYLER DIVISION

GERALD AHEARN, JAMES DENNIS, CHARLES W. JEEP and JAMES ELLISON, on Behalf of Themselves and Others Similarly Situated,
Plaintiffs,
v.
FIBREBOARD CORPORATION and BETHLEHEM STEEL CORPORATION,
Defendant,

CONTINENTAL CASUALTY COMPANY, CNA CASUALTY COMPANY OF CALIFORNIA, COLUMBIA CASUALTY COMPANY and PACIFIC INDEMNITY COMPANY,
Defendants- Intervenors

OWENS-ILLINOIS, INC., on Behalf of Itself and Others Similarly Situated PENN MUTUAL LIFE INSURANCE COMPANY and PLANT INSULATION COMPANY

Additional Counterclaim Defendants.

CONTINENTAL CASUALTY COMPANY, CNA CASUALTY COMPANY OF CALIFORNIA, COLUMBIA CASUALTY COMPANY and PACIFIC INDEMNITY COMPANY,
Plaintiffs,
v.

DANIEL HERMAN RUDD, JR., BEVERLY WHITE and JOHN HANSEL, on Behalf of Themselves and Others Similarly Situated,
-and-
OWENS-ILLINOIS, INC., on Behalf of Itself and Others Similarly Situated, and PENN MUTUAL LIFE INSURANCE COMPANY,
Defendants

C.A. No. 6:93 CV 526 // C.A. No. 6:94 CV 458

RELEVANT DOCKET ENTRIES

DATE	FILINGS-PROCEEDINGS
August 29, 1995	Judgment on Attorney's Fees of the United States District Court for the Eastern District of Texas
July 27, 1995	Memorandum Opinion of the United States District Court for the Eastern District of Texas
July 27, 1995	Judgment Regarding Class Certification of the United States District Court for the Eastern District of Texas
September 9, 1993	Order Provisionally Certifying Class for Settlement Purposes of the United states District Court for the Eastern District of Texas
September 9, 1993	Class Action Complaint

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

FIBREBOARD CORPORATION

VS.

CONTINENTAL CASUALTY COMPANY

Docket No. 6:93cvil
Tyler, Texas

TRANSCRIPT OF SETTLEMENT HEARING
BEFORE THE HONORABLE ROBERT M. PARKER, CHIEF
JUDGE FOR THE EASTERN DISTRICT OF TEXAS

(list of appearances omitted)

PROCEEDINGS
August 27, 1993
4:30 p.m.

THE COURT: Be seated.

Do you have an announcement now, gentlemen?

MR. RICE: Your honor, Joe Rice on behalf of the court-appointed negotiating committee. Your Honor, we have been working basically around the clock with CNA and Fibreboard Corporation and lately with Pacific Indemnity trying to come to essential terms on a proposed settlement agreement that we would subsequently get in form and present to the Court.

I think the intent today is to try to announce to the Court the significant terms of an agreement that we believe will be reduced to writing in a short period of time at which time we would present it formally to the Court. I think maybe the easiest way to do that, if the Court is -- it is agreeable to the Court is just I will try to go through the essential terms and then when I finish if I leave something out, I'm sure there is enough people here to supplement it as we go forward.

As the Court has requested, we are dealing with a futures action only. Let me get to the microphone so I can get on the record. The agreement is that Pacific Indemnity and CNA, on behalf of Fibreboard would pay into a settlement vehicle trust that would be created, the cash equivalent of $1,525,000,000 plus interest at the 90-day T-bill rate as of today with that deposit to be made no later than January 1, 1994 in a lump sum payment at that time.

They have the option of paying it earlier if they wish, but that is the latest date they can make the deposit into an agreed-to account. The interest drawn on the money thereafter would belong to the trust or the -- upon final approval.

In addition, there are a group of unsettled present cases that will be identified, and there is a budgeted amount that will be finalized. It is not quite yet finalized. To the extent that budgeted amount is not needed to resolve that group of unsettled present cases, 80 percent of the amount remaining would then be transferred free and clear to the trust. The trust would then be responsible for complete defense litigation handling of the future cases that would have legal claims for personal injury, asbestos-related injuries as to Fibreboard.

There are two groups of cases that collectively refer to one group as green card cases. In presenting the final definitions to the Court, the green card cases will be defined in such a fashion

to be considered future cases, green card being a case that took a dismissal without prejudice against the Fibreboard Corporation on a previously filed suit and has the right to come back upon subsequent development of a non-malignant disease process of certain severity or a malignancy. Those would be cases the trust would be responsible for.

As to cases that have previously filed claims against Fibreboard but who received a cancer waiver only, either by settlement with cash payment or by some other negotiated value but their only right is to return for a malignancy claim, those claims would be considered presents and would remain the responsibility of the Fibreboard Corporation and their insureds under any agreements they would have, but they would not be the responsibility of the settlement trust.

In addition, the Fibreboard Corporation will make a payment of $10 million dollars at present cash equivalent, and that will be used by the trust to fund a subsequent annuity-type payment that we would present on further detail to the Court later, but it is additional payment in addition to the amount paid by CNA and Fibreboard -- excuse me CNA and Pacific Indemnity.

In addition, this will be presented to the Court as a 23(b)(1)(b) class action. This agreement will not be final until the Court has had the opportunity to review it in all of its essential terms to determine the fairness of it, to make a finding on the reasonableness of it, to review it in detail, and take whatever testimony and whatever examinations the Court deems appropriate. We want to make it clear at this time this deal is completely contingent upon Court approval and the Court's complete investigation of the deal on all issues that the Court deems appropriate.

In addition to the terms I have set forth, the Fibreboard Corporation will be responsible for the intake administration for a

period not to exceed five years. The administrative part would be basically the suits would be filed against Fibreboard Corporation. They would do the intake, put it into the computer system, and then turn to the trust the responsibility for negotiation, liquidation, or handling the cases after the global was approved.

Fibreboard, upon approval of the global corporation, will waive any attorney/client privilege, will waive any confidentiality, will waive any trade secrets, and all other essential information necessary to put the trust in the position to fully stand in the place of Fibreboard in the underlying tort litigation for subsequent claimants or members of the class that may claim injury, so that the trust would be in a position to fully understand, evaluate, and defend those actions.

Fibreboard Corporation will assign to the trust any and all claims for contribution and indemnity they have against other joint tort-feasors arising out of asbestos personal injury cases.

To the extent that this settlement or any other actions on behalf of Fibreboard Corporation or these insureds creates the availability of additional insurance funds available to the Fibreboard Corporation from companies other than CNA and Pacific Indemnity, those funds will be used solely for the purpose of which they are intended, that is, for defense and indemnity payments. Generally there will be a written agreement that further elaborates on this, and to the extent that those funds are remaining at the time that they are no longer needed by Fibreboard, any remaining funds will become property of the trust.

There is a provision under the April 9th agreement between CNA and Fibreboard that deals with a $95 million contingent payment by CNA; and that payment, to the extent not otherwise wrapped into these payments, would become property of the trust. We understand that when everything is said and done be-

tween Pacific and CNA and Fibreboard during the interim of the operation of the global while we are proceeding through this Court and if necessary through the appellate process, there may not be any of that fund left; but to the extent that it is, it is our position it becomes property of the trust if it is not already part of the value received.

Your Honor, the agreement when finally presented to the Court would require the carriers at CNA and Pacific Indemnity to fund all costs of the operation or this proceeding itself through to final resolution and the payment of class counsel attorney's fees as approved by the Court will be the additional obligation of CNA and Pacific Indemnity not to be credited against any previous monies paid or specifically not to be part of the $1,525,000,000 paid into the trust. It would be additional funds once approved by the Court.

THE COURT: The definition of future cases, the definition provided to me earlier representing, as I understand it, the agreement of the parties, is as follows: "The settlement class generally consists of all persons, who have now or may have in the future, asbestos-related injury or death claims against Fibreboard or related companies or persons except those who settle those claims or file lawsuits on those claims before August 27, 1993."

MR. RICE: Your Honor, that would be amended when we finalize it about what I said about the green cards and the cancer waivers and also it will be amended to clarify what is meant by related companies or persons. It is the Fibreboard Corporation and those that bear legal responsibility for their asbestos liability, and we will clarify that.

THE COURT: Mr. Wachtell, you rise.

MR. WACHTELL: I rise. I just want to be sure that -- I think Your honor inadvertently omitted the word "personal" when you were reading from the sheet of paper before "injury." I think it is personal injury or death claims.

THE COURT: Did I not say personal? I had intended to.

MR. WACHTELL: I think it was a slip of tongue, Your Honor.

THE COURT: You are correct.

MR. WACHTELL: I just want to be sure that there is nothing about the related companies or persons that expands what we understand we are talking about here, but I don't think we will have any difficulty with that. I have several additions just for clarification and specification to what Mr. Rice has proffered, Your Honor.

MR. RICE: I wasn't finished, but you --

MR. WACHTELL: Oh, I'm sorry, Joe.

MR. RICE: That's all right.

MR. WACHTELL: No, go ahead.

THE COURT: I thought you were through. Go ahead.

MR. RICE: Your Honor, in addition that before this global settlement was to be presented, we understand there will be presented to the Court for approval a bilateral agreement between the insureds and Fibreboard Corporation such that the integrity of this settlement will be preserved against any ruling that may come, be it adverse to one party or the other out of the California

insurance litigation. So this settlement will resolve as it relates to this fund being created, the insurance litigation. That in litigation for other reasons may have to go forward one insurer, one carrier, one other manufacturer, we don't know. But the full intent of the parties, as we understand it, is that this settlement will live beyond the outcome of the coverage litigation no matter how that litigation is resolved. And that has to be subject to Court approval, as we understand it, the bilateral as well as the global.

I think those are the essential terms --

THE COURT: You are not talking about California court approval, you are talking about this Court's approval.

MR. RICE: No, Your Honor's Court approval.

Your Honor, I believe those are the essential terms. I hope I have not left any out; and if I misstate them, I'm sure someone is going to clarify me.

THE COURT: Mr. Wachtell.

MR. WACHTELL: I think I am in accord with most of what Mr. Rice has said and where I am not, I will try to specify. I think he is accurately referring to an agreement in principal for a global settlement of all future personal injury asbestos-related claims against Fibreboard. As he indicated, this includes resolution of the coverage dispute as to these claims and --

THE COURT: Coverage dispute between CNA, Fibreboard, and Pacific.

MR. WACHTELL: That is correct, Your Honor. And as Your Honor has previously been advised, there is a agreement between Continental and Pacific with respect to sharing of the

settlement, global settlement that we are talking about, subject to Court approvals.

THE COURT: As I understood our previous conversations and the extensive negotiations, this agreement is subject to board approval.

MR. WACHTELL: This global agreement is likewise subject to board approval, Your Honor. Now to specify things that I think have been mentioned and are understood --

THE COURT: No. You and I did not communicate. This agreement, as I understood it, is subject to board approval on the Fibreboard -- I'm sorry on the CNA/Pacific agreement. If CNA and Pacific do not have board approval for that agreement earlier announced, then that is -- nullifies the global agreement.

MR. WACHTELL: That is correct. It is a condition to the --

THE COURT: Plus the global agreement is subject to board approval.

MR. WACHTELL: That is correct, as well, Your Honor.

Okay. With respect to the amounts that have been specified to be payable on this global settlement of the future claims, the obligations of Continental and Pacific are several. In other words, each will pay the amount agreed upon between them pursuant to that contract between them, and the aggregate of those amounts will be the amounts that have been agreed upon with Fibreboard and the claimants as recited.

With respect to the escrow fund that is to be created, as correctly indicated, not later than January 1 of 1994, Your Honor, the investments in that fund will be subject to joint agreement; and if there is a failure of such agreements, the default provision is that the money will be invested in treasuries of two years or less maturity.

Well, the escrow then -- the concept is the escrow is obviously subject to joint control and will follow the question of final approval of the global. If there is final approval of the global settlement, the original principal amount plus accrual -- accrued earnings thereon will flow into the settlement trust. Upon failure of such final approval, the fund principal together with earnings will revert to Pacific and Continental in their pro rata shares.

THE COURT: Now, that's not my understanding of the negotiations. It was my understanding that it would revert pursuant to the terms of the bilateral agreement.

MR. WACHTELL: I was going to come to that, Your Honor. If there is a bilateral and that is finally approved then -- I was going to refer to that.

THE COURT: Now, Mr. Wachtell, the confusion I have and I might not have understood Mr. Rice, does the interest obligation begin on -- at the time of funding which is no later than January 1, '94, or does it begin at an earlier date?

MR. WACHTELL: No, unfortunately I think he said it began today.

THE COURT: Well, I didn't hear.

MR. WACHTELL: I'm sorry, Your Honor. I'm sorry to have to say that we had to agree that it begins today.

THE COURT: All right.

MR. WACHTELL: Your Honor, the -- as has been indicated, this is -- the agreement is for a mandatory non-opt-out clause pursuant to Rule 23(b)(1)(b) of the Federal Rules of Civil Procedure, and I think it is the parties' intent to very shortly be presenting papers appropriate to Your Honor for your consideration for certification, for settlement purposes only of a preliminary certification of such class for settlement purposes.

In return for the monies that Continental and Pacific will be agreeing to pay pursuant to this global settlement, Continental and Pacific and Fibreboard are to be receiving total peace, what I term total peace. This is an all-end settlement with respect to future claims as they have been defined for Your Honor, and that include without limitation protection against and bars against any cross claims of any description whether by way of contribution or indemnity, any direct action claim that may exist under the laws of any jurisdiction, any claims by Fibreboard for indemnity defense or anything else under the sun. In other words, these amounts are buying the insurers and Fibreboard total peace with respect to any claims, direct or indirect, involving these future claimants as defined. I think that --

THE COURT: The only element that I recall that I think has not been mentioned, in the unlikely event of failure to achieve Court approval and failure to achieve approval of the -- well, or as part of the bilateral agreement, the relation of the funds to Fibreboard's benefit would include the interest.

MR. WACHTELL: Your Honor, I'm sorry. I keep on saying I am going to be referring to that. I guess I am trying to go down my notes, but if you want me to talk -- because I have a number of items on the bilateral –

THE COURT: I thought you were winding down.

MR. WACHTELL: Oh, no. I am just trying to decipher my own handwriting, Your Honor.

THE COURT: I should have known better. Go ahead.

MR. WACHTELL: I think there was reference to -- and quite correctly by Mr. Rice to the fact that Continental and Pacific have agreed to pay the reasonable fees of the Plaintiffs' negotiating committee as fixed by the Court, and that should be separate and apart from the amount agreed to be paid to the future class. I think I should note without meaning to indicate to Your Honor what, you know, is or is not an appropriate fee for Your Honor to determine upon, that our agreement is -- our obligation to pay that amount at least is not going to exceed three percent of the overall sum going into the futures class, which I think we have agreed would be the 1.525 billion plus any additional amounts pursuant to the arrangement that Mr. Rice described.

It is intended that the trust and the agreements will have pay-out provisions from the trust designed to provide pay-outs over a 45-year period and that those will be reasonably satisfactory to the insurers and to Fibreboard. It is the intention of the parties, and the parties are agreeing --

THE COURT: Well, let me interrupt you again. It is my understanding that given the arrangement negotiated for the additional contribution represented by the $10 million contribution by Fibreboard, that there is an additional 20 years in the trust -- so it is a 60-year operation.

MR. WACHTELL: Yes, I think that is accurate, Your Honor. My 45-year reference is to the pay-out and distribution

provisions with respect to the funds agreed to be provided by Continental and Pacific.

The parties have agreed to cooperate forthwith to request of the California Court of Appeals before which the appeal in the coverage cases is pending, to refrain from rendering a decision as to those issues that are unique to either Continental or Pacific on the one hand and Fibreboard on the other in that appeal.

It is also intended to be a term of the definitive agreement that upon execution of that agreement, the parties will seek a stipulated reversal in the California coverage cases of the judgment of the superior court, insofar as that judgment was adverse to Continental and Pacific. Fibreboard acquiesces in Continental's having negotiated for and entering into a futures only global settlement, as well as agrees to Continental entering into the specific global settlement that is being outlined for Your Honor today and acknowledges that this is entirely consistent with the April 9, 1993 agreement that exists between Continental and Fibreboard.

I do turn to the bilateral agreement, Your Honor, as that would be an agreement between Continental and Pacific on the one hand and Fibreboard on the other to settle any and all claims against Continental or Pacific or their respective policies with Fibreboard, and that would include direct claimants, cross-claims, claims by Fibreboard, the totality of claims that could be raised under the policy. Such a bilateral would be subject to final Court approval.

And there is, as Your Honor had indicated, a correlation between the -- that agreement, as I think Mr. Rice has indicated, is essentially intended to exist as a stand-by agreement in what we all think is the unlikely -- well, I should not presume. In the event -- I don't want to presume on anything. In the event that the global agreement should fail final Court approval for any reason,

and my partner Mr. Rosen has the language that I think has been discussed between the parties as to the precise correlation of the consideration. Leonard.

MR. ROSEN: This is the -- one of the terms that was discussed at some length today was the question of what the cost of the bilateral might be, and the following language I think is satisfactory to both Fibreboard and Continental in terms of what the price term of the bilateral might be: The first element of it is that the -- it has to be recognized that the costs for the present settled cases and the unsettled cases are and will remain an unknown. Fibreboard will deal with them in negotiations for a bilateral to achieve a reasonable approximation of the anticipated cost to Continental of disposing of those cases under the terms of the April 9 agreement. That is one element, the present settled and the present unsettled.

The second element of price would be with respect to the future cases, and there we agree that the price, the bilateral price for that element of the bilateral agreement will be calculated and have two parts to it. The first part would be an amount equal to the amount which Continental and Pacific have agreed to pay to the Plaintiffs in a global, including in that amount or plus whatever interest may be earned or actually accrued on that amount since interest is going to commence accruing today, and it is the net amount of that interest. If there are any taxes, that would come off. But the entire amount plus the net interest would be devoted to the bilateral.

And in addition, the cost of the contemplated fees and expenses of the global that are saved by not doing the global, by which we would mean the costs and expenses referred to of Plaintiffs' Counsel, the notice costs that we are agreeing to; and, in addition, there is an obligation under the April 9 agreement to pay the counsel fees of Brobeck in connection with the global. To

the extent any of those costs are saved, that could be a relevant price term with respect to the bilateral so that the bilateral would be equal in cost roughly to what the global would have cost.

Lastly, I would mention only as to the April 9 agreement. It is contemplated that that agreement will require some modification, and that it will basically continue in effect with respect to the administration of claims. During the interim period while the global and the bilateral are going through the Court process, that will remain substantially in effect to the extent not inconsistent with the understandings that we have talked about with respect to the global and bilateral, and that will be worked out as we negotiate the details of the bilateral, which we will be doing in the next -- the near term, the next few days or weeks, Your Honor.

MR. WACHTELL: I think what Mr. Rosen has just said covers my note that -- let me just ask him because I don't want to say anything inconsistent from what he was just saying.

(Conference off the record.)

MR. WACHTELL: With respect to certain other provisions of prior agreements between the parties, Your Honor, assuming final approval of a global or bilateral agreement, there is -- there are various provisions in the March 27, 1992 agreement between Fibreboard and Pacific with respect on certain contingencies to payments of amounts up to I believe $330 million to be paid by Pacific to Fibreboard. And assuming final approval of the global or bilateral agreement, it is understood and agreed that those obligations are deemed fully satisfied by the amounts that Pacific is agreeing to pay as its share of the global or bilateral.

Likewise, the same is true as to certain provisions of the April 9, 1993 agreement between Continental and Fibreboard where Continental essentially agreed to back up the payments of

Pacific under that prior March 27, 1992 agreement. Those, likewise, will be deemed fully satisfied.

There was a couple of items that Mr. Rice mentioned, which we have not previously been cognizant of, some of which I just want to reserve on because I'm not sure I understand the implications, but I am sure we will work them out in negotiating the definitive agreement. For example, there was a mention -- and I'm not meaning to be all inclusive here -- of Fibreboard assigning to a trust -- to the settlement trust, claims over against others. I'm not sure I have an objection to that. I have just simply not thought through --

THE COURT: The indemnity or contribution claims?

MR. WACHTELL: Excuse me?

THE COURT: The indemnity or contribution claims.

MR. WACHTELL: Yeah, I think if we are getting a full bar order against other people, I may well have no problem with that whatsoever. I simply have not thought through the potential implications and would like -- don't want to be deemed to have acquiesced without having done so.

There is one thing that Mr. Rice said that, however, I think I understood enough to say I was not in agreement with it and I think was not understood, I think it is probably going to be an academic issue, and that is that if any money was not expended of the 95 million that is referred to in the April 9, 1993 agreement between Continental and Fibreboard, I think Mr. Rice said that any such remainder would flow into the settlement trust.

That I think is not accurate. I think under the terms of the April 9th, 1993 agreement any such money is not expended of the property of Continental; but again I think there is a good likeli-

hood all that money will indeed be expended, so it is probably an academic point.

Your Honor, I do not think I have anything else on the terms of the understandings of the parties.

THE COURT: Mr. Bschorr.

MR. BSCHORR: Thank you, Your Honor. Just a couple of clarifications to make sure that we have it. We have already discussed these agreements both the Fibreboard/ Continental agreement and the futures agreement to be ultimately written up subject to board approval. We expect to get that board approval promptly.

With respect to the Fibreboard/Pacific Indemnity agreement that has already been referred to by Mr. Wachtell, the basic understanding there is that any monies that we would otherwise be obligated to pay under that agreement, are fully satisfied here or if they are paid there, result in a credit so that there is nothing more that we are to pay.

One clarification on the California case. As Mr. Wachtell indicated, we are going to file very promptly a letter followed up by whatever else is necessary to seek to have the California court first be apprised of what happened here and secondly seek with their indulgence that they not issue any opinion with respect to the discrete issues between Fibreboard -- or among Fibreboard, Pacific Indemnity and Continental.

As part of the global futures settlement, there will be, as Mr. Wachtell said, a stipulated reversal request placed to the California court. If that request is granted, it will further -- the global will provide that if by chance the global settlement before this Court as it winds its way to the courts approve and the bilateral,

which is affixed or annexed to it, both fail of ultimate court approval, final court approval; that at that point, the appeals in California as to those discrete issues will be reinstated before that court for decision by that court, so that at the end of the day we expect if the global goes forward, if the global doesn't, the bilateral goes forward but only if both fail of ultimate court approval, do we go back to that fall back position.

THE COURT: Well, I had understood contrary to that during the negotiation this afternoon, that if the global fails, if the bilateral fails, the funds would be available to Fibreboard and would not revert back to the parties, including --

MR. BSCHORR: No. I don't understand that at all, Your Honor.

MR. WACHTELL: No, Your Honor, if the global fails, then assuming final approval of the bilateral, then under the fundamental price provisions that Mr. Rosen outlined, the monies that otherwise would have been devoted to the global will be available to the bilateral; but if the bilateral also fails final approval -- and let me say because I think I omitted to say, that what is meant by final approval there is a judgment of the Court, final judgment of the Court essentially adjudicating and cutting off any claims of any parties, direct, cross-claim, or whatever against the insurers or the policies, if that fails a final approval, well then all bets are off and the money reverts to the respective insurance companies.

THE COURT: Well, I invite counsel perhaps to have additional conversation. My understanding was that the goal sought to be achieved by Continental and Pacific was to place forever, and with Fibreboard's agreement and with the Plaintiffs' agreement, you had negotiated a limit of future liability whether it is by contribution to the trust or by indemnity payments if the trust and

the bilateral fail with Fibreboard receiving the benefit of the accrued interest.

MR. WACHTELL: No, I don't believe --

THE COURT: Am I correct?

MR. WACHTELL: I think you are incorrect, Your Honor. It has always been the position of Continental and since Pacific has come to the table, so to speak, that given the magnitude of the dollars that we are talking about and areas of the law that are not entirely free from doubt with respect to the power of the parties to enter into a bilateral agreement without participation, for example, of each and every claimant or cross-claimant, that the only way that the insurance companies would be prepared to make such monies available to Fibreboard would be if there was indeed a final Court judgment and proceedings to which all potential claimants have been made parties directly or in a representative capacity adjudicating that the agreement was valid, fair, and did cut off all of the rights.

THE COURT: I understand.

MR. WACHTELL: So that has always been an element of the understanding.

MR. BSCHORR: That certainly is my understanding.

MR. RICE: Your Honor, it is our understanding, in simple language I think, if you are going to do a bilateral agreement, if the Court finds that a fair and reasonable agreement, then the global will go forward. If the global goes forward and the Court finds it fair and reasonable and we get final decision, if the

global is for some reason not approved the bilateral stands; if the bilateral is not approved, they are back in California court.

THE COURT: I understand.

MR. BSCHORR: And just the final point, Your Honor, is, with respect to the Fibreboard/Pacific agreement of March 1992, there will be a term in this global, that any of those terms in that agreement that are not inconsistent with what we are doing here will be reaffirmed and made part of this agreement so that we have everything presented to the Court for approval and to go out for the full notice. Thank you.

THE COURT: Mr. Snyder.

MR. SNYDER: Your Honor, I am going to limit myself to picking up points where I think some addition or clarification is needed so I am not restating generally any of the terms of the agreement here.

With regard to the interim administration obligation of Fibreboard for a period not to exceed five years, I believe that we should clarify that our agreement is that that is an unconditional obligation for the period that the approval process of this global agreement is in the court. We, that is Fibreboard, will use its best efforts to get the support of its insurers to continue that through the end of the five-year period.

With regard to the waiver of confidences and privileges in order to invest the trust with the information necessary to defend the claims, we expect and there is an agreement, that the trust will be required to keep those confidences and that we will structure the transfer of that information in a way to protect them within the ambit of the attorney/client and work-product privileges to the extent that we can.

With regard to the cross-complaints for contribution and indemnity, those claims and Fibreboard's assignment to the trust, I believe that what Mr. Wachtell -- Mr. Wachtell arose on this point I believe our agreement is that Fibreboard transfers all of its right and title to those claims. If by some right of subrogation under an insurance policy or otherwise an insurance company is the true owner equitably or legally of that claim, then it would be subject to that right.

I simply wish to add to Continental and Pacific, the point on behalf of Fibreboard that Fibreboard also must have board approval, and it will be seeking board approval for entering into this agreement.

Mr. Rosen correctly made the point that the April 9th agreement between Fibreboard and Continental continues in effect with regard to interim claims administration. I would also like to point out that our arrangement is that that agreement is unaffected and continues in effect with regard to the unfinished business of disposing of the settled and unsettled present claims. It is not part of this global agreement, but it is something that survives in the April 9th agreement.

Moreover, the bilateral agreement, the price term on which Mr. Rosen described, that price term is the price term that we have agreed upon in the absence of a global agreement, going back -- in the absence of global approval. Going back to a circumstance that we just discussed. In the event that the global for any reason is not approved, the fall back is the bilateral. The price term under those circumstances is as Mr. Rosen has described it. What that bilateral says about the responsibilities of the parties in the event that the global is approved, is something that is yet to be negotiated as part of that bilateral agreement.

Those are all my remarks, Your Honor.

THE COURT: Anything further from the Plaintiffs?

MR. RICE: A couple of minor points, Your Honor. No. 1; we understand that Pacific and Continental cannot today disclose the terms of their agreement, subject to board approval. We understand upon their receiving board approval, which should be in the next few days, that we will be given disclosure in writing as to the terms of that agreement, at which time then we understand that the payments will come one from the -- one payment from Pacific and one from CNA, but it is our position that both of those payments must be made before this deal goes forward. This deal is contingent upon both payments being fully made.

In addition, I want to make it clear that the escrow funds and the interest or earnings on those escrow funds would be used for the benefit of the trust upon approval of the global, and none of those funds would be available to provide for the cost or fees in this case or in the proceedings that we are -- will go forward with.

We understand also that a request is being made to the California court to deal with the appeal. There is nothing conditional about what happens in California as far as this deal is concerned. We want to make sure that is clear. And the request from California court to enter a stipulated reversal is not a condition of the global deal in any way, shape or form.

MR. BSCHORR: The granting of it by the California court. It will be a condition that the application be made.

MR. RICE: Mr. Snyder and I seem to have a little bit of difference on the administrative -- the five years versus the period of time. We won't burden the Court now. We will try to work that out, and if not we will be back with the Court on that.

THE COURT: Mr. Wachtell.

MR. WACHTELL: Let me burden the Court on that. I guess I should have arisen to this a moment ago, but I overlooked it in my notes. When we indicated that separate and apart from the monies, that we are agreeing to pay a settlement into the trust that we had independently committed, as I indicated, to pay counsel fees, as approved by the Court, as I indicated, and the costs of notice and dissemination of notice. We are not agreeing and have not agreed to pay the costs of administration of the trust, and that includes in matters that we have not agreed and have not been consulted upon any period of five-year interim administration by Fibreboard let alone any period beyond that. That is not something we are agreeing to.

One other comment by Mr. Snyder, which I am not quite sure I understand, so let me just issue a caveat. He said he was in agreement with Mr. Rosen's description of the price term on a bilateral as a bilateral stood to -- as I understood him to say -- as a back up to a global, but then he said something about that this was not necessarily the case other than the bilateral being a back up to the global. Without seeking to understand what he was saying, I just want it to be clear that there should be no implication that in any circumstance is the consideration going to be greater than would have been payable -- or payments due from us to be greater than what would have been due under the global.

One second, Your Honor.

(Conference off the record.)

MR. WACHTELL: I'm sorry. When we said counsel fees of the class counsel, in my parlance that was meant to include reasonable expenses of class counsel in connection with the doing of the deal as well. I did not mean to omit that, Your Honor.

THE COURT: Mr. Wachtell, did you secure the identity of the presiding judge on the California panel.

MR. WACHTELL: Yes, Mr. Eshelman has that, Your Honor.

THE COURT: I will be available to meet with counsel in chambers if you want the Court to advise that court of these proceedings.

MR. ESHELMAN: That will be helpful, Your Honor. It is William A. Newsome, and I have his phone number and address.

THE COURT: Mr. Snyder, you have another matter?

MR. SNYDER: Two minor points, Your Honor, and that will be it. I want to make sure that the record is clear that Mr. Wachtell and the people at Continental have not been consulted with regard to these interim claims administration costs. That's something we need to discuss, but I am not representing that they have agreed to any of this.

Mr. Bschorr I believe said something about the Pacific Indemnity agreement with Fibreboard being satisfied by these payments, and I think he will agree that that is true only in the event that the final global or the final bilateral occur. If we fall back on our -- on the state of no agreement, the state of nature we have now where we have to go back to the coverage case, then either that agreement is reinstated or we have to work out what happens to it because that is not clear.

MR. BSCHORR: That agreement is reinstated.

MR. SNYDER: My remarks with regard to the price term on the bilateral were only intended to emphasize that what we had

agreed to, Mr. Rosen and I, about the price that is in effect for the future cases component of the Fibreboard liability in the event that the global is not approved, that is, if we have to fall back on the bilateral terms. Mr. Rosen and I have no agreement on exactly how the bilateral agreement will work if the global is completely finalized.

THE COURT: Thank you, gentlemen. I will meet counsel in chambers if you wish me to have communication with the California court.

MR. WACHTELL: Your Honor, may I just, before you leave the bench, express on behalf of all parties, a very great appreciation to Your Honor for the effort that went into permitting us to come in to announce this understanding today. I think this is a very, very major transaction. I think it is a major step in solving and giving an example of how a problem that has plagued the courts in the nations here can be solved, and I think Your Honor provided the spark for this, the guidance, and got us all together and made us stay with it until this deal could be done, and I want to express my thanks.

THE COURT: Thank you, gentlemen.

MR. SNYDER: Your Honor, for the first time in this proceeding I agree with everything Mr. Wachtell says.

(End of hearing.)

CERTIFICATION

I, Shea Sloan, do hereby certify that the following is a true and complete transcript of the proceedings had in the above-entitled matter.

August 27, 1993
SHEA SLOAN, CSR, RPR

APPENDIX C

EXCERPTS FROM TRANSCRIPT OF CLASS ACTION SETTLEMENT FAIRNESS HEARING HELD BY THE DISTRICT COURT

Opening Statement of Elihu Inselbuch, counsel for class counsel Tr. 32-36

of thousands of people will have to be decided. And I think the court will have to come to grips with the question of whether or not in these circumstances this settlement, which resolves a controversy under which significant risk was taken that there would be no payments at all, comes within the framework of the Rules of Court and the Constitution of the United States.

THE COURT: Does the definition of a limited fund have room for market forces, the negotiating process; in other words, how much the market will bear as far as an insurance company is concerned, and what they're willing to pay to settle litigation?

MR. INSELBUCH: in don't know about -- in would not address it quite that way, Your Honor. in think the definition of limited fund -- and there is -- or at least the risks that are required to be -- to exist for Rule 23(b)(1)(B) to apply certainly recognizes that if there is a risk about assets at all then there is a risk that there will be recovery.

There's at least one District Court case that has held that when you measure the assets available, you ignore disputed assets. in think one thing we can say is that when a dispute is resolved at arm's length that, in effect, quantifies what perhaps the value of the claim might have been before it was resolved.

And it may be possible to look at the trilateral settlement and say, "Well, the value prior to August 27, 1993, of the claim that Fibreboard had for insurance coverages, which as of that date was unliquidated, could now be measured in some sense

or approximated in some sense by the agreement that was reached at arm's length as between the insurers and Fibreboard. But, of course, on August 26 there was no assurance that the agreement would be reached and matters were uncertain.

What we will demonstrate to Your Honor is that even if we follow that approximation, that that -- that even with the trilateral in place, the risks that we are talking about under Rule 23 would still well be in place because the risks in the tort system could well overwhelm that fund.

THE COURT: In the litigation marketplace, the parties have negotiated a dollar amount in this proposed settlement that took into consideration the vagaries of California coverage litigation and the contribution, if any, Fibreboard could make to resolving claims and the prospect or quantification of future claims coming from future claimants.

MR. INSELBUCH: Yes, sir.

THE COURT: That negotiating process in that marketplace produced a dollar amount.

MR. INSELBUCH: Yes, sir.

THE COURT: And the question in rather inartfully asked before is: Does that fund, prospective fund that's been negotiated now become legally a limited fund because it reflects the reality of the litigation marketplace?

MR. INSELBUCH: There are some who certainly believe that that is the case, that that is a way to approach and analyze what is before the court.

THE COURT: But whether it does or not, should that affect any decision this court has to make? You thought you were just going to make an opening statement, didn't you?

[Laughter]

MR. INSELBUCH: Well, in think it's probably useful for the court, whatever the court's questions are at the outset, to be addressed so that the evidence can be heard in that context.

The answer, Your Honor, the are a number of ways among us of looking, that we all have of looking at why Rule 23

provides a route, a procedural route to a resolution her. And one thing in would say at the outset about the procedural rules, it's now well over a hundred years since we worshiped procedural rules and let the procedural rules govern the rights of the parties. in think we all would agree that it's the subject of the procedural rules just to provide a resolution that is within the substantive and constitutional law of this country.

Having said that, there are a number of ways to look at what Rule 23(b)(1)(B), which is the rule that we are addressing here, brings us. What are the requirements to satisfy that rule? The rule doesn't talk in terms of the limited fund. It talks in terms of when there are competing claims among a group of people. And there is a risk that the earlier claimants will, in effect, either destroy the claims through litigation process or take all of the assets and leave nothing for later claimants.

The limited fund is, of course, and example of that situation. But the limited fund, some would say, exists when you address the risk and when you address the question of what to do.

On August 26, 1993, what was the fund? If you want to ask what is the limited fund, the limited fund would have been all of Fibreboard's assets subject to all of Fibreboard's liabilities, and its assets included the disputed claim that it had against its insurers. That fund could well have been worth zero if Fibreboard had lost its insurance litigation. Because its existing obligations to prior asbestos plaintiffs overwhelmed, in fact dwarfed, its assets.

One approach to looking at the limited fund would be to say that was the limited fund or that was the situation where the plaintiffs were facing the risk that if there were no resolution then there would be no right down the road for others to be paid.

Others have other theories. Each one of the participants at these counsel tables have a different view of how one might approach Rule 23. And in would suggest, Your Honor, that we defer in-depth consideration of those issues until we've had an opportunity to brief them and present them to the court.

THE COURT: You dodged that question ver well, counsel.

Opening Statement of Herbert Wachtell, counsel for Continental Casualty Co. Tr. 49-53

to attempt to track all of the lengthy and torturous negotiations that ensued. There are, however, a couple of specifies that I think it would be worthwhile to refer to.

The first of these is the April 9, 1993, agreement between Continental and Fibreboard which operated in a critical way to shape the positions of Continental and Fibreboard going forward.

As I indicated, Your Honor, Continental deemed it essential to its interests to turn off the ongoing Fibreboard assignment program, and in particular the threatened multi-billion-dollar global settlement by assignment were they were going to pay out--agree to pay out billions of dollars of our money, and if we were to lose the coverage case and if the right assign had been upheld, we would have only been left with the recourse of writing a check.

Moreover, Your Honor, we determined that without Fibreboard's cooperation, it was apparent that it would be virtually impossible for Continental to open up or engage in meaningful negotiations with representative plaintiffs' counsel. And accordingly, a deal was struck by that April 9, 1993, agreement, and not purporting to cover all of the terms: Fibreboard would make no further assignments and would not purport to enter into any settlements without Continental's consent. That's what we got. Got some other things, but that was the critical thing we got.

Fibreboard and Continental would jointly use their best efforts in good faith to seek to negotiate a global settlement agreement of all claims against Fibreboard or Continental, present or future.

And by the agreement, the door was opened to Continental to negotiate directly with plaintiffs' representative counsel, with Fibreboard's cooperation.

But in return, Fibreboard demanded its price. Were there to be a global settlement agreement, Continental had to agree that it would be entirely funded from Continental's and Pacific's insurance coverage. And that would be true whether the claimants were pre-'59 or post-'59. Continental had to agree that whatever portion of such global settlement Fibreboard would otherwise be called upon to satisfy out of its own assets, instead Continental would satisfy and such obligation and would not look to Fibreboard for reimbursement.

The other point that I would make about the sequence of negotiations here, Your Honor, that I think is pertinent, is that it was not until the last few days, essentially the last week of negotiations prior to the announcement in this courtroom of the August 27, 1993, agreement in principle that tit actually began to appear that there was a indeed a realistic probability that a global settlement could be struck here. And the reason that is, as the evidence will show, Your Honor, was that at no time was Continental prepared to bear the entire burden of any such global settlement agreement without being -- without either receiving or being in a position to receive proportionate contribution from Pacific, which was the other insurer here.

And indeed it was for that very reason that the evidence will show that Continental had ultimately become persuaded, in the summer of 1993, that it was not feasible to attempt to go directly to a global settlement agreement with the plaintiffs and Fibreboard, which had been Continental's going-in desire and preference, because Continental concluded that tit was first necessary to enter into a settlement with Fibreboard and the Ness Motley plaintiffs which would terminate the Ness Motley litigation before Your Honor, in which Your Honor was being asked by Fibreboard to foreclose any liability for contribution from Pacific to Continental.

Because as we saw it, Your Honor, so long as Pacific viewed that lawsuit as providing a potential escape hatch from liability, there was no prospect whatsoever of getting Pacific to come to the table with their proportional share, and absent Pacific doing that there was no prospect whatsoever of getting a global settlement here.

Your Honor, the evidence will therefore establish, Your Honor, that when the April 9 agreement was entered into, albeit the parties were determined to attempt to negotiate a global settlement, and when the Ness Motley agreement was entered into in August and Your Honor appointed negotiating counsel to attempt to reach such an agreement, while the parties wished to reach a global agreement and hoped that they would reach a global agreement, it was really not until Sunday, August 22, the Sunday before the Friday, August 27 agreement in principle, that an agreement was struck with Pacific on that Sunday, where Pacific backed down and agreed to pay its share of liability, and the hope of achieving a global agreement at that point began to appear to be a realistic potentiality.

And the reason I emphasize that, Your Honor, is to -- two things: The first of which goes squarely to the questions that Your Honor was asking of Mr. Inselbuch, as I understood them.

The April 9 agreement provided the framework for the ultimate global settlement. As I have said, it gave to Fibreboard a contractual right that if there were to be a global, Fibreboard's insurers would cover the entire cost and would not look to what other wise might be Fibreboard's responsibility. And that agreement, Your Honor, not a collusive agreement by any stretch of the imagination, an agreement reached in intense arm's length bargaining at a time when there was no assurance, to say the least, that there ever would be a global agreement, was then as much a part of Fibreboard's corporate reality, its assets and liabilities on August 27th of 1993, as some tree in the forest owned by Fibreboard or some ski resort owned by Fibreboard or some bank debt

owed by Fibreboard. There was a contract. If there is a global, Fibreboard's insurers would pay the entire tariff.

Opening Statement of Herbert Wachtell, counsel for Continental Casualty Co. Tr. 54-59

And second, Your Honor, the Ness Motley agreement, the revised Ness Motley agreement, which was reached in early August of 1993, was still at a time when it was highly an uncertain deal that there ever would be a global, and the only uncertainty that the Ness Motley plaintiffs had in entering into that agreement was that they would received the up-front 50 percent of their agreed-upon value of claims. And the back ends remained far from certain. And the values, as the evidence will show, that were negotiated represented that continuing uncertainty.

And Your Honor, as I have indicated, the proofs will show that the negotiations for this global agreement were hard fought at arm's length between sophisticated counsel on all sides, and that the class was adequately represented indeed.

The proofs will show that from the outset Continental, for very good and sufficient reasons, was adamant that any global agreement here would have to be done on a non-opt-out basis. And when Your Honor asked Mr. Inselbuch what was the most difficult question facing this court in this hearing, my answer to Your Honor would be that that is the most difficult question. it is a legal issue. Is it appropriate and proper to do that on the particular facts and circumstances of this case? We deem it is or we wouldn't have been wasting out time negotiating this for months and months and months and spending, I think, $16 million on a notice campaign and coming to this court asking this court for approval. But that is, I think, the most difficult issue that Your Honor will have to wrestle with on this hearing. As Mr. Inselbuch indicated, it will be one that we will be briefing.

But I will simply say on that issue now that Continental was only willing to deal on a basis where it was putting its liability to bed once and for all, and that Continental believed that it would be impossible in the particular context of this case, in the first place, in any meaningful way to value opt-outs of future claims; and secondly, uniquely to this case, that in the light of the posture of the California coverage litigation as it existed and the anticipated timing and sequence of what was going on in that California coverage litigation to have given to the plaintiffs an opt-out would essentially have been giving to the plaintiffs a unilateral option to have or not ro have a global agreement. In other words, if developments in the coverage case seemed to be progressing favorably to Fibreboard, we would have faced the prospect of massive opt-outs from the settlement, but conversely, if developments in the coverage case were proceeding -- progressing satisfactorily and favorably to Continental, we would nonetheless be locked in. And, frankly, we had no willingness to enter into any agreement which gave our adversaries a one-way, unilateral option.

The evidence will show that plaintiffs' counsel were resistant to proceeding on that basis. They would have preferred, for obvious reasons, to do an opt-out deal and that ultimately Continental's insistence on a no-opt-out transaction cost Continental in the Price negotiations. Continental was compelled to pay more money as the price of a global settlement in order to secure total peace. And Continental as a corporate matter made the decision that it was prepared to pay more. It was prepared to pay what I think is a rich settlement here in order to put it to bed once and for all, no opt-outs, no third-party claims, no continuing entanglements here. We paid for it, and that is the settlement that is being presented to the court.

The evidence will also show, Your Honor, that the parties had originally intended to attempt a global settlement that would encompass both presents and futures but ultimately determined to simplify the negotiation and the legal issues, in part at

Judge Higginbotham's strong suggestions to the parties that a futures only transaction was what the parties ought to do.

The evidence will also show that the parties were under great pressure, as Mr. Inselburch has noted, to reach an agreement in principal at the end of August 1993, because it was plain that a decision from the California intermediate court was imminent and there was no assurance under California procedure that the unsuccessful party, no matter which side it might be, would be granted review by the California supreme court, Because under California procedure there is no right to such review; it is purely discretionary.

And there was the real prospect that the decision of the California intermediate court could be the final decision in the matter in the California courts. Neither side, Continental or Pacific on the one hand, plaintiffs and Fibreboard on the other, thought it desirable to rig the outcome of that decision.

Immediately upon the August 27, 1993, agreement in principle being reached, the California Court of Appeals was indeed asked to hold off and sever for decision, not decided major issues unique to Continental and Fibreboard on that appeal. That application was granted subject to periodic report to that court as to the status of the present settlement proceeding.

And the evidence will show that it ten took months of further intensive, hard further negotiations to reduce to agreement first the trilateral settlement agreement and then the global agreement.

And finally, the evidence will show that the global settlement agreement which is before Your Honor in this Ahearn proceeding is far preferable from the point of view of the settlement classes here than is the trilateral agreement which is the subject of the Rudd action; that that trilateral agreement, while it is so plainly superior to the parties risking the outcome of the coverage litigation, would nonetheless continue to place the class at the risk of substantial impairment of rights, would not settle the claims of health claimants it would simply give them a fund to

shoot at, would provide no scheme for equitable distribution of those claims, so that you would have a race to the courthouse with the fleetist of foot getting funds, or those who manifest the disease later cold find themselves empty-handed.

The evidence will show, on the other hand, that that trilateral agreement would be of very great benefit to fibreboard's counsel, the Brobeck firm and the other firms who would be defending the claims that would be brought against that fund and who would be required to expend hundreds of millions of dollars of legal time and costs in defending the claims of asbestos victims against Fibreboard, money that would go to the lawyers and not to the victims.

Your Honor, we will ultimately be briefing all of the issues here, that the procedures we are following we believe to be quite lawful under the Constitution and the Federal Rules; that not only has the class been adequately represented here by class counsel, but that as an added layer of protection for the members of this class this court has appointed Professor Green as guardian ad litem, Professor Green being totally independent, so that there could be no question, if this court does approve this settlement, that all interests of all members of the class have been fully protected.

Thank you, Your Honor.

Opening Statement of Fred Baron, Counsel for the Ortiz Intervenors Tr. 89-92

THE COURT: I have another notebook not. Is that from you --

MR. BARON: No, Your Honor.

MR. MILLER: That's a notebook to which we will turn later, Your Honor.

THE COURT: All right.

MR. BARON: Your Honor, I've attempted to tab some documents, some of which I may refer to in my opening that the court may want to read along with.

Your Honor, let me also begin by clearing some brush. We think that the settlement that was reached between Continental Insurance, Pacific and Fibreboard is a superior settlement; we think it is something that ought to be approved very promptly by this court; and we think that that settlement will resolve all of the issues that otherwise would be before this court. That settlement known as the trilateral is a great settlement, as far as I
m concerned, I know of no one that opposes it. And I think when it goes into place the problem that Fibreboard has with asbestos litigation will be ended and the tort claimants will be able to continue to use their constitutional and state rights to the federal and state courts.

Your Honor, having said that, there are problems with this settlement, the Ahearn settlement. The No. 1 problems is the legal problems. There is no limited fund. and to get right to the heart of the matter, Your Honor, I placed a chart up on the easel there. If you're nearsighted, like I am, you could turn to tab 41 in the documents. Tab No. 41 in our book is a letter that was sent to the stockholders and friends of Fibreboard. It's dated June of 1994, and it is a summary of the remarks of John D. Roach, who is the chairman and chief executive officer of Fibreboard. In his remarks, he discusses asbestos litigation. The bottom line to this document is the highlighted section: "Either the global settlement or the separate insurance settlement agreement," which we call the trilateral, "should resolve all personal injury asbestos liabilities within existing insurance and established reserves."

In English, that means that even if the Ahearn settlement is tossed asunder, it is not approved for whatever reason, the backup trilateral agreement will, in the estimation of Fibreboard, provide them with adequate insurance coverage to deal with all asbestos claims asserted against them in the tort system by any victim who has a problem, forever.

THE COURT: Let me treat you like I did Mr. Inselbuch. If I understand your basic premise, you pose no complaint to the fact that a settlement was reached between Fibreboard and its insurance carriers that would limit the available resources in one mechanism or the other.

MR. BARON: That's not correct, Your Honor.

THE COURT: Let me finish, counsel. Your -- your complaint focuses on the class action mechanism as a means of making available to claimants the proceeds of that settlement between Fibreboard and its carrier. Right?

MR. BARON: That's not exactly right, Your Honor.

THE COURT: Tell me how that's off.

MR. BARON: Your Honor, I don't believe that the law makes that choice available to begin with. I don't think that there ever is, has been or would be a choice under the law, 23(b)(1)(B).

THE COURT: Well, do you complain today or have any complaint about the fact of a settlement between Fibreboard and the two carriers? You know, there are some interesting issues associated with that. I mean, is there any focus from you on that aspect of this whole matter or not?

MR. BARON: I think Fibreboard has every legal right to settle directly with their carriers, and I believe particularly under these circumstances the settlement that they've reached that is before the court in the Rudd case is entirely appropriate and adequate.

THE COURT: Okay. So then as far as you're concerned in this processing I can focus on whether 23 -- Rule 23, and in particular 23(b)(1)(B), is an appropriate or legal mechanism for facilitating that settlement?

MR. BARON: That's only one of the issues that I would like the court to focus on. And I think Mr. Rice perhaps summarized it in away that joins the issue. Mr. Rice would have the court believe that the only issue here is whether the procedure set out in the Ahearn settlement would be better for claimants than what they would get if the trilateral settlement is approved. That

is not the issue. The issue is, No. 1 -- there's three pieces to this -- No. 1, can the rights of victims be abridged without their consent? First issue.

Opening Statement of Fred Baron, Counsel for the Ortiz Intervenors Tr. 106-114

So Fibreboard go Continental to agree that the only way that they could do a class action settlement was to put it so that Fibreboard would not have to pay any of its own money.

Now, class counsel wanted desperately for the settlement to go forward. But they knew all along that Fibreboard was taking this position, that Fibreboard wouldn't do it unless it was clear to Fibreboard that Fibreboard wouldn't have to pay any of its own funds. And in fact by letter to class counsel dated December 3, 1991, tab No. 12, Fibreboard, through Mr. Snyder, says, "Fibreboard has made it perfectly clear from the beginning that it is only interested in an insured deal; it intends to enter into global settlement only if it can fund the settlement on that basis. If plaintiffs cannot accept this, then the parties are wasting their time."

From day one the only way these people could get their three percent was for Fibreboard to walk free.

Your Honor, that presents too many opportunities for class counsel, particularly in view of the fact that we now have a settlement that not only is going to be appropriate through Fibreboard's own CEO's month, but I asked Mr. Snyder about the settlement. and if I might approach this, Your Honor, the last tab in the book -- actually, I say I asked it, it was the counsel for the future claimants that asked the question, Mr. Golan asked the questions, and he was asking a follow-up: If I remember correctly, you were either optimistic or hopeful that if the global was disapproved and the trilateral were approved Fibreboard could survive indefinitely?

Answer: Yes

Question: Perhaps for decades?

Answer: Perhaps forever.

Question: Perhaps forever?

Answer: Yes

Does that mean you think it is more likely than not that if that were to occur Fibreboard -- and if that were to occur means the global Ahearn settlement being disapproved and the trilateral approved -- Fibreboard could pay the future claims within the $2 billion provided under the trilateral?

Answer: Yes, that's what it means.

Question: Do you think it is more likely than not that that will happen? Although, of course, there is a risk that much more than 2 billion will be required.

Answer: Yes, I do believe that's what will happen.

So there was never any issue here but that that agreement would do the trick. the problem is class counsel couldn't get their fee, the three percent, unless there was a global settlement. They are not taking the position, and I asked them this question: would there have not been a trilateral if you had not jumped into this thing? They said they didn't know one way or the other. Maybe they would have settled. What they have done is forced on these victims a non-opt-out class that eliminates their constitutional rights to access the courts in return for a three percent fee.

Your Honor, in terms of the belief of class counsel as to the viability of this action, I would merely turn to tab 24. Tab 24 is a memorandum that was written by Mr. Rice and Mr. Cox and it was addressed to Judge Higginbotham, who was reviewing the viability of a class action. And I would ask -- what this is, it's a legal memorandum on the use of (b)(1)(B). And I would start on page 6, Your Honor, where it says, quote, this is Mr. Rice and Mr. Cox, "It is not evidence here that a limited fund exists." This is the letter, they're referring to Mr. Wachtell's letter about how you can use (b)(1)(B). It says: "The letter asserts that Fibreboard is insolvent, but it is not clear that Fibreboard would be willing to go

through a hearing and make the kind of showing of insolvency and estimation of the cost of future claims that was required in Manville. Moreover, it is not at all clear why Continental should be considered a limited fund in this situation."

Then they go on, on the next page, page 7, says: As explained above, the classic case when a limited fund proceeding should be viable is when there is a definable race or fund before the court that the court can then equitably divide among all class members whose aggregate claims exceed the limited fund. Yet if Fibreboard is not willing to put all of its assets before the court to divide among the asbestos plaintiffs, including, for example, its shareholders equity, then those plaintiffs are not being fairly treated because by the definition of a limited fund proceeding they are being forced to settle their claims against a fund that contains less than all of the assets that should be available to pay those claims.

Those plaintiffs are not bing fairly treated unless all of the assets of Fibreboard are in this deal.

Straight out of the mouths and pens of class counsel.

They then go on to say the point of this argument is that there is a bankruptcy procedure designed to marshal all of the assets of an insolvent entity such as Fibreboard and to divide them fairly among all the creditors, including asbestos plaintiffs. A limited fund proceeding should not be allowed to substitute for bankruptcy in this regard. That's what they reported to Judge Higginbotham. They site adequate cases, the memo was well written, it's clearly the law, Your Honor. Not close.

On the issue of conflict, it's very interesting that beginning in July, Judge Higginbotham was told by Mr. Snider, in a letter dated July 12th, which is tab No. 28, concerning the global negotiations, "Quote largely on the strength of Joe Rice's representation that a global settlement certainly will follow a settlement of the Ness Motley cases, the parties have made substantial progress in the Ness Motley negotiations." You settle ours, we'll do your deal.

Your Honor, Mr. Sweeney recognized that early on, as did numerous of the other parties. when Your Honor appointed these lawyers to represent the class in the (b)(1)(B), the first party to raise an objection was Pacific Indemnity. In fact, in a letter dated August the 20th of 1993, which I've tabbed as No. 31, Mr Rice reports a telephone call to his class counsel cohorts from Judge Higginbotham, says: Judge Higginbotham raised a new issue that no one else had mentioned to us. apparently Pacific Indemnity, during the discussions with CNA and Judge Higginbotham, raised the issue of a conflict for the plaintiffs counsel. Their position was that since only Ness Motley had resolved their cases, that the other claimants still had open claims. and indeed that was the case.

Tab 32 is a memo that Mr. Sweeney wrote after he had been appointed class counsel, dated August the 20th of '93, saying that he had received a telephone call from a Mr. Peter Coleman who says he is in charge of settlements for Fibreboard. He says Fibreboard is most anxious to resolve all of our present cases, Mr. Kazan's present cases and Mr. Wartnick's present cases before the deal is done. And indeed, Your Honor, tab No. 35 is the motion of Robert E. Sweeney to be dismissed as class counsel because in his words, "Your movant represents that he has a conflict of interest concerning future participation in these proceedings as he represents claimants who have interests adverse to future claimants who will have claims against the fibreboard company." He recognized and that he wanted out and he got out.

Your Honor, from a legal point of view, the deal doesn't work. From a factual point of view, the deal can't work. Here is a defendant coming to you, coming to the public, reporting to their shareholders that they have adequate funds to pay all asbestos claimants without a class action. Here is the chief counsel, outside counsel, for that company parroting that. We are dealing with the abrogation of substantial constitutional rights of victims. Will it turn out that some victims will be better off if Ahearn was approved? No question. There will be victims who make the de-

cision that they want their day in court, they want a jury trial, they try the case, they have a bad jury and they lose it. Would they have been better off taking the money in Ahearn? Of course they would have. In terms of economic benefit. But they have the undeniable constitutional right to make that decision. And, Your Honor, that is the reason we're here and why we are objecting.

THE COURT: Counsel, would all your objections be answered if instead of utilizing rule 23 we called this Chapter 11?

MR. BARON: If I had my druthers, Chapter 11 would be a viable possibility for Fibreboard to select.

THE COURT: Would this settlement not be a proper plan under Chapter 11?

MR. BARON: This particular settlement couldn't be a proper plan under Chapter 11, because the assets of Fibreboard are not impaired.

THE COURT: They negotiate deals all the time in bankruptcy court that winds up resolving conflicts companies have with others and leaving their assets unimpaired.

MR. BARON: Your Honor, in this bankruptcy, I don't believe anyone with a straight face would be able to say that all claimants are unimpaired. In this type of a settlement, I just don't believe that there's any -- I don't believe you will hear evidence from anyone that that's going to be the case. So in a bankruptcy situation, which there won't be, because Fibreboard doesn't need to be bankrupt, because it's not insolvent in any way, not only do they get $2 billion from these insurance companies, they get all of their other claims, with the exception of some, wiped out. when fibreboard comes out of this proceeding, if the global is disapproved and the trilateral is approved, they will only have a handful of claims left to deal with. they've estimated what the cost of settling it will be. And in the scheme of things, although hundreds of millions of dollars are a lot of money, they have adequate funds to do it. If they want to, they can walk out of this courthouse after approval of the trilateral and have no asbestos claims pending against them for the time being, until new claims get

filed. And they have then adequate funds to deal with those claims. And I hope Fibreboard does well. And I hope Fibreboard is worth a billion dollars as a corporation 30 ears from now. Because if the coverage doesn't provide enough money, those victims in the back end will be able to utilize the value of Fibreboard to satisfy heir claims rather than merely wait in line as they would under Ahearn.

Your Honor, I've read Rule 23 over and

Testimony of Stephen Snyder, Fibreboard counsel Tr. 144-45

get out of control. So what Fibreboard looked for mainly when it went into the facility, I believe, at that time was a chance to exercise some influence on dockets, to do something about the number of cases that were coming on the dockets where there didn't seem to be any disease, and to keep the defense costs and the values within reasonable limits. And it was -- it was going to be though the bargaining ability of the facility to settle cases on large numbers of defendants -- for large numbers of defendants that the facility hopefully would be able to exercise that control and keep the litigation within rein.

Q. At the time Fibreboard entered the facility, would you explain the corporate goal which was described by some in opening statements with respect to managing and resolving the asbestos litigation?

A. It had been Fibreboard's corporate goal for some time to manage and resolve its asbestos liabilities within its available insurance resources. That was a principle that was etched onto the forehead of every asbestos lawyer that worked for Fibreboard and had been for years.

Fibreboard was spending, for a company of its size, enormous resources out of its cash, because it had to pay lawyers to prosecute its coverage litigation, and the goal that it had in mind was this deliverance that it would get if it was successful.

Viewed from Fibreboard's perspective, how did the ACF perform with respect to these fundamental matters on which Fibreboard was measuring things?

A. I think the facility did a very good job of controlling costs. And I think we all learned a lesson that those transaction costs could be squeezed out of the system effectively and still maintain a credible case processing and settlement reality in the litigation. For Fibreboard, and this is not true for all people in the facility, but for Fibreboard it did not work on liability and case control issues. The cases in the west, where Fibreboard was accustomed to paying a share much greater than 12 percent were controlled. The dockets did calm down in the west. But the dockets in the east and the dockets in Texas didn't det controlled. And particularly in the east, where Fibreboard was accustomed to paying a very small share, now there was a multiplication of cases in these foreign jurisdictions where it was required to pay the flat 12 percent share. And there was an increase in the

Testimony of Stephen Snyder, Fibreboard counsel Tr. 168-175

national meeting of plaintiffs' lawyers that was reported in the Asbestos Litigation Reporter and in Mealey's that Fibreboard was negotiating towards a global settlement.

And then as 1992 wore on and we were doing the negotiations in Ness Motley, it became clear that it would be possible to get into the Ness Motley deal if you were a Ness Motley affiliate. And we had a lot of these cases in late '92 were unfiled cases. So we had a swelling of the number of cases that came on in '92, because we had gone out to each of the Ness Motley affiliates and said: We insist that you put all of your cases in this deal, whether you filed them or not, as long as they're in your office. And it was their response to this that created this swelling of filings.

Q. Now stepping back a moment and just considering the various factors that led to these various spikes and filings over

time, how did Fibreboard -- how did Fibreboard's noninsurance resources compare, when you encountered these various surges of filings, to the challenges they presented for you?

A. It depends on what time you pick. But if you pick -- if you pick the period at the end of 1992, Fibreboard had outstanding obligations to plaintiffs, claimants, on settled claims in excess of 41.2 billion. As far as cash in hand went, it didn't have any more cash in hand than it had when it came out of the ACF in 1988. In fact, it had a lot less, because at that time it was in a struggle with continental over Fibreboard's entitlement to defense resources to defend itself in litigation. So if you compare that 1.2 billion to the $200 million, or whatever value want to give to Fibreboard, the Fibreboard net worth was insignificant compared to that. And, of course, to that you had to add 60, 70 thousand pending cases that hadn't been resolved yet on top of that 1.2 billion, and then you had to add all the future claims. Whatever number you would assign to them, those have to be paid, too.

Q. Well, I would like to turn your attention to the advent or announcement of the structured settlement program upon departure from the ACF. First of all, would you tell us why you found it necessary -- first of all, explain briefly what the SSP was and is and why you found it necessary to employ that device.

A. the structured settlement program -- sometimes referred to as Fibrebucks --

[Laughter]

THE COURT: By people other than me.

[Laughter]

THE WITNESS: By a lot of people.

THE COURT: Be fair about it.

[Laughter]

THE WITNESS: -- was Fibreboard's response to its situation immediately upon coming out of the Asbestos Claims Facility. Fibreboard's situation was very unusual. Small company that wasn't worth a lot of money, compared to its liabilities, not a lot of cash available to pay claims, but a potentially very

substantial insurance asset. And when Fibreboard looked at itself and compared itself to other companies that were facing extreme circumstances coming out of the facility, the Raymarks, the Eagle-Pichers, the Celotexes, Fibreboard made a decision to go 180 degrees in a different directions from the way they had went, and it's because they had the option to go that way. I'm not saying that they necessarily had a choice. Fibreboard's option was to go to the plaintiffs and to lay before them all the facts about Fibreboard's value, its claims and its insurance resources and make a plea that the plaintiffs give Fibreboard credit as a bridge loan to get it from 1988 to the date that it would finally resolve its coverage cases. Hopefully we thought that would be done by September of 1993. And that's a date that appears as the maturity date in the SSP. But there was also a right to extend, in case it took longer than that, until 1996. And, of course, that right has been exercised, because we still don't have a resolution of the coverage cases.

The SSP, as ordinally conceived, was to ask for a hundred percent financing. Fibreboard would promise to pay fair value for the cases, but the plaintiffs would have to give a hundred percent financing. We took that to the plaintiffs' bar nationally in late 1988 and pretty clearly got turned down everywhere we went. That was the first iteration of the structured settlement program.

Q. All right. What did you do to come up with a new, better or improved SSP?

A. Couple of things. We had information from the people that we had talked to, it was pretty clear that they had a couple of problems. First of all, they wanted some cash before they would accept any kind of arrangement. And they weren't totally against the idea, but they were concerned that Fibreboard could not be trusted to conserve its resources and that if they didn't pull its resources out of it right now it might run away and hide those resources at a later time. So they were concerned about that. And in many of our talks with people, we were told that the people that they referred to or consulted with on what to do about their Fibre-

board cases were the lawyers in California, principally the norther California lawyers Steve Kazan and Howard Wartnick. We went back with the thought if we could make the structured settlement program work with those two lawyers that the word would get out that this was a program that could be trusted and accepted.

So we met with them late in 1988. I think they investigated the coverage case, they did some basic work on fibreboard's corporate resources, and we negotiated a structured settlement program in 1988 that had a 40 percent cash component in it for the pre-'59 cases that were covered by the Continental and Pacific policies if we won the cases. But we didn't have to pay any cash on the post-'59 cases, where our resources were thinnest. That was one component.

The other component was that in each structured settlement program deal that Fibreboard signed, it made a promise to the claimant that it would not make any impermissible distributions, that's a term of -- defined term in the agreement. That means it would not make dividend distributions of any kind above a certain limit, it would not do a leverage buyout, it would not do any of those corporate reorganization type things that the plaintiffs were afraid that a company like Fibreboard would do in order to escape liabilities in the litigation. That was the structured settlement program that we negotiated with Harry Wartnick and Steve Kazan. and that was half of the program.

The other half of the program was we had to figure out how to pay the 40 percent, because 40 percent was -- we didn't have that much money. Fibreboard had just over a hundred million dollars, and that was not going to be enough to finance this program. So we went to Continental and to Pacific and talked about a possible coverage settlement. It was clear we couldn't do a complete settlement, and it was clear with Pacific that they were not interested in an interim agreement. And so we entered into an interim agreement with continental Casuality in December of 1988. And those were the two pieces of the structured settlement program. Both those fell into place in December of '88.

Q. All right. Now, the court has the so-called interim agreement as an exhibit, but bearing in mind that what you say certainly isn't intended to modify or abridge any of it, would you just walk us quickly through its principal terms?

A. The 1988 Fibreboard Continental interim agreement had a term that ended in December of '92, unless there was a complete resolution of the coverage cases before then, in which case I think it ended earlier.

Under the terms of that agreement, continental agreed to pay indemnity up to certain amounts every year to fund the structured settlement program and to pay defense up to certain amounts every year. I think the caps were on a full annual basis $25 million in defense per year. And Fibreboard agreed to use its lawyers to defend the cases and to stay on the front lines, so to speak. In other words, Fibreboard had to be out there selling the structured settlement program, do as many settlements as it could, it would use the money from the interim agreement to pay the 40 percent component, and then when the coverage case was all wrapped up, if Fibreboard won the coverage case, then it would take these structured settlement program notes to continental on the pre-'59 side and present them for payment. And at that time continental would look at them and decide whether it would agree or not agree with the values of the structured settlements.

There was one other component, a very important component of the deal, and that was before Continental had to pay any of its money for indemnity for the 40 percent payments, Fibreboard had to take its hundred million dollars that it had gotten from Home, AIG and apply it first. So there was a buffer in there. That money went in first, then the Continental money went in. Then if fibreboard won the coverage case at the end, Continental would give the money that Fibreboard had put in back to Fibreboard to pay for its post-'59 liabilities. And we call that the interim agreement credit mechanism. That's the basic structure of the deal.

Q. Now, going into the interim agreement in December of 1988, was Continental otherwise providing a defense to Fibreboard in the asbestos cases?

A. No.

Q. Did fiber -- describe Fibreboard's ability to provide only a defense, if any, at that time, absent something from the insurance.

Testimony of Stephen Snyder, Fibreboard counsel Tr. 186-196

Indemnity alone?

A. Yes. Right after that we continued talking to Pacific Indemnity in the fall and had reached, I think, an agreement in principle by the end of the year. Which was then -- I think Mr. Irwin took it to Continental to see what their reaction to it would be or whether they wanted to participate or have some involvement.

Q. All right. And obviously we have the agreement for the record, but would you tell us roughly when it was finalized and from Fibreboard's perspective what it meant?

A. It was signed in signed in March of 1991. What it meant was that in light of the difficulties that Fibreboard was having on the one hand with Continental or getting additional defense funding, and on the other hand with Continental or getting additional defense funding, and on the other hand in the litigation with judgments now having been entered in Denver Turley, and an adverse verdict in Cimino, and facing trials in New York and Baltimore, just having had filed in the middle of 1990 the Linscomb case in this court, I believe it was, the Eastern District of Texas, which sought a -- to impose a mandatory class action on Fibreboard on the grounds that it was a limited fund, the agreement with Pacific Indemnity provided two important things:

First, it provided some small amount of additional defense funding. I think there was up to a possibility of as much as $20 million to do that. And it cashed out the Pacific Indemnity

policy; that is to say, that policy which provided essentially duplicate coverage on pre-'59 cases. That would be a necessary thing to have if fibreboard was having to strike out on its own, given the existence of having some conflict now with Continental on the interim agreement.

Q. All right. After reaching -- was the agreement with Pacific conditional in some fashion upon obtaining an order from a court?

A. It was conditioned -- that reminds me. The thing was on appeal, because it was conditioned upon getting in the court of appeal in California a stipulated reversal from the appellate court. That would have the effect of providing to Pacific Indemnity what in essence would be a judgment that it was not liable to Fibreboard which would have the effect of cutting off any contribution or indemnity rights that Continental would have against Pacific Indemnity. And there was a section of Judge Brown's judgment in 1990 that did in fact provide for contribution and indemnity amongst insurers.

Q. What happened shortly after the agreement was entered into requiring stipulated appellate reversal?

A. Another department of the court of appeals, but in the same district, wrote an opinion, the Neary case -- this was like a few days after we signed this agreement saying that the court of appeals would not under any circumstances provide stipulated reversals upon the stipulation of the parties in connection with the settlement. And so as of early April 1991, we didn't know where the Pacific Indemnity deal was gonna go. And we began a process whereby we waited for the Neary case to go up into the California Supreme Court to see what would happen. In the meanwhile, time limits were running under the Pacific Indemnity deal throughout '91 and were about to expire, I believe, towards the end of '91.

Q. All right. We're going to bring the court back to 1991 in a minute. But just to finish the Pacific Indemnity story, Mr.

Snyder, did you ultimately negotiate another new deal with Pacific Indemnity?

A. Yes.

Q. When did that occur? And explain briefly what it provided.

A. The second Pacific Indemnity deal was signed in March of 1992. It had the same basic purpose, which is to provided interim defense funding for Fibreboard and provide a cash out that would allow Fibreboard to pay for its post-'59 obligations. The principal difference between the '91 and the '92 deal was that by the time '92 had ended, fibreboard had entered into assignment settlements totaling over almost a billion dollars. And the value of its settlements had been inflated substantially in the course of those negotiations. And in order to pay for the post-'59 liabilities and come out of it with any -- anything left, Fibreboard needed a lot more money. And Fibreboard's demand for more money to Pacific Indemnity was credible because the court in Alameda County had said in the Andres case that Fibreboard was justified in doing the settlements, and Fibreboard was negotiating with the plaintiffs at that time to do not only one more assignments but a global deal based upon an assignment. So when Pacific Indemnity sat down at the table with Fibreboard in early 1992, it was looking at a much different picture than it was looking at in late 1990.

Q. And ultimately what amount of money were you able to get, conditioned on what?

A. Fibreboard got some more defense money in addition to the '91 deal. I think it spend $10 million out of the '91 deal. And it got a high/low settlement essentially. The pacific Indemnity 2 high/low deal would provide as much as a hundred million dollars or as much as $330 million plus $30 million in defense costs, which would be about $360 million. Fibreboard couldn't get the high amount, however, unless first it won the coverage case, and second it got a 5.2 order. A 5.2 order essentially was the surrogate, what was missing in the Pacific Indemnity 1 deal. It would

be an order from a court saying that Pacific Indemnity, by paying this money to Fibreboard and entered into this settlement, was freed from its contribution and indemnity obligations to Continental. Of course, this wasn't an order that was to be sought in the court of appeals, because the Neary case still was in the California Supreme Court. And so this had to be an order that Fibreboard would get from some other court of competent jurisdiction over Fibreboard, Continental and Pacific. We call that a 5.2 order because that was the paragraph in the agreement that applied.

Q. And many of the documents that the court will have for consideration refer to that. So that is what is meant by 5.2?

A. Yes.

Q. What happened to the Neary case shortly after the new Pacific Indemnity agreement was reached?

A. It was reversed.

Q. Meaning what?

A. Meaning that Pacific could have settled for $140 million, but that was history. Now we had a different deal.

Q. Now I want to go back, Mr. Snyder, at this point, although you referred to it briefly, to the launch or the initiation, if you will, of the assignment settlement program. Would you give us, if you would, the essential terms of the various assignment of settlements which were negotiated?

A. The assignment settlement agreements that were negotiated by Fibreboard starting in late '90, early '91 and all the way through early '93, each were different. It just wasn't like the structured settlement program where we wrote a document and took it out to every body and everybody had to sign the same deal. These were very large settlements that we were entering into and every agreement had some differences from every other agreement. However, they did have most of the following things in common:

First of all, fibreboard paid no cash. Didn't have any cash at that time. And so it paid no cash to settle these cases.

Secondly, typically they were settlements that covered either a large number of cases in a consolidation or for that matter all the cases that a firm had in its office. And Fibreboard was doing so-called inventory deals because this was the only way that it could settle out of entire jurisdictions to get out from under these consolidated trial threats.

Since in doing an inventory deal you don't obviously go through all the files of all the plaintiffs beforehand, these provisions -- these agreements have pretty elaborate provisions in them for case processing and what do you do if somebody doesn't want the deal, whether opt-outs would be allowed, and that sort of thing.

In terms of the payment to be received for the settlement, all of the deals provided that on -- with regard to pre-'59 cases, Fibreboard would assign its right to collect the settlement amounts from Continental to the plaintiff. And that if Fibreboard won the coverage case, the plaintiff would then seek its collection from continental. They also provided for interest and they also provided that if a later court found that Continental had acted in bad faith, that the plaintiff was the owner of those bad faith rights and could collect on that as well. If Fibreboard lost the coverage case, Fibreboard had to pay for the pre-'59 cases. And Fibreboard made the same covenants that it did in the structured settlement program to preserve for the benefit of these claimants its net worth and corporate resources, so that if it did lose the coverage case, it would be healthy and well and could be liquidated for their benefit. For post-'59 cases, no cash was paid. That had been the story from the beginning. And the plaintiffs accepted the post-'59 structured settlement program note.

There was another feature. That is since we were doing overarching inventory deals that covered pre-and post-'59 cases all at the same time, both of these agreements provided a point system whereby cases were valued. Points were assigned based upon your first exposure, duration of exposure and severity of disease. The net effect of the point system was to ensure that the

preexisting relationship between the value of pre-and post-'59 cases was preserved. and so as a result of these settlements the post-'59 cases normally paid a small portion of the settlement amount and the pre-'59 cases paid a substantially higher portion of the settlement amount. An example would be that in a typical inventory of cases where 15 percent of the cases were post-'59, all other things being equal, about three percent of the money would come from those cases.

Q. The various of the assignment settlement agreements contain a requirement of obtaining a 5.2 order?

A. The earlier ones did not, but the ones entered into after the Pacific second settlement in March of '92 did, most notably, of course, the Ness Motley agreement in 1992; but also one of our agreements with Mr. Kazan did, I believe, too.

Q. All right. Was it your experience in negotiating assignment settlements that plaintiffs demanded and received some sort of premium or inflation, some might put it, of preexisting values?

A. The -- there's no doubt that the assignment settlements were inflated in value to compensate the plaintiffs for the substantial risks that they were taking. They were getting no cash, they were getting almost certain litigation with Fibreboard and Continental, and that litigation as it turned out was quite bitter and expensive in some cases; and they were really getting a right to a second negotiation with continental once that litigation came to a head and if Continental lost the coverage case.

Q. And by a second negotiation, what do you mean by that?

A. The plaintiffs took the position that they were really not settling with Fibreboard, they were simply getting entre to the insurance companies through this settlement, and they knew full well that the real settlement values would be determined when they sat down for the second time to negotiate with the insurance company if the insurance company lost the coverage case.

Q. Did those with whom you were negotiating on assignment settlements raise the possibility of legal infirmity or the invalidity of Fibreboard's right to do that?

A. Yes, they did. And they insisted that each of these settlements be approved by a court before they would -- before they would become binding upon the plaintiffs and the plaintiffs would give releases. Their concerns were Continental's very outspoken objections at that time on at least two points:

First, that the values were too high and were unreasonable and even if Fibreboard had a right to assign and settle, it had a duty to enter into only reasonable settlements.

And secondly, that the assignments themselves violated both the interim agreement which had provisions about cooperation, no assignability, and the need for claim-by-claim evaluation, and more significantly the underlying insurance policy which had a no assignment and a cooperation clause in it. And so the plaintiffs realized that Continental was taking the position that Fibreboard may vitiating their insurance here --

Q. Even if they won the coverage case?

A. Even if they won the coverage case.

Q. All right. And in view of those issues, do you have any way of estimating for us by what level or approximately how much the inflation or premium factor was in various settings.

Testimony of Stephen Snyder, Fibreboard counsel Tr. 202-203

On the venue issue, the matter stayed in the Northern District of California and was abated or dismissed in Houston, I don't know which, and then ultimately went to judgment in Judge Thelton Henderson's court in the Northern District of California where he determined on summary judgment that those punitive damages were covered. And I think that we -- that Fibreboard got that judgment in early '92, if I'm not mistaken.

Q. And did that give you some assistance with regard to convincing folks that the assignment program was a worthwhile risk?

A. That helped. The Andres decision in Alameda County in July of '92 helped. And frankly in a perverse way the litigation that we had with Continental arising out of the assignment litigation helped as well.

Q. All right. Now tell us about the conflict with Continental on the property of the assignment program. First of all, to set the stage, there was the interim agreement by which Fibreboard was given some money for defense. Correct?

A. Yes, that's correct.

Q. And did Continental, for example, take the fundamental or basic position that compliance with the interim agreement excused or obviated any obligation it might have in that regard under the insurance policy?

A. If I understood their position correctly, they took the position that the interim agreement had redefined the policy for the interim policy and that if it complied with the interim agreement Continental was -- was -- was providing all the defense that it was obligated to provide. Fibreboard took the position that the underlying obligation to provide a complete defense existed, and that if that turned out to be that the interim agreement was inadequate, then Fibreboard was within its rights, as any insurer -- insured would be to make assignments of individual amounts under the policy to mitigate its damages.

Q. All right. Did Fibreboard's position in that respect generate intense controversy?

A. Very intense controversy. Continental objected to everything about this program and they objected to every negotiation that occurred under this program, and they objected at every stage of every negotiation that occurred under this program. They objected that the assignment program violated the policy, it violated the interim agreement, that it -- that Fibreboard was improperly diverting AIG/Home monies

Testimony of Stephen Snyder, Fibreboard counsel Tr. 205-208

object to the relevancy of this testimony.

THE COURT:

He's about persuaded me, Mr. Miller.

MR. MILLER: Your Honor, the relevancy of this is that it absolutely explains and sets up the controversy between the parties which gave rise to and justified the assignment settlement program, out of which whatever, or to a very large degree, whatever bargaining leverage Fibreboard had arose.

MR. BARON: How is that relevant to any issue in this case?

MR. MILLER: It was relevant to show that this was absolutely adversarial, hard fought. This is how we got to where we are today. Nothing collusive, nothing put up abut it, it was a dogfight. And in simple language, we think that is much of the relevance of what we're offering to the court in this regard.

THE COURT: Go ahead.

MR. MILLER:

Q. Mr. Snyder, we have in the record the chronology of the various litigations that ensued between the parties, but again for the benefit of the record at this point, could you quickly sketch out the litigation that was brought between Fibreboard and the insurers with respect to the assignment program?

A. Assignment litigation ranged from early 1991 through 1993, was actually concluded in this court with the April 9th agreement. I think the first piece of litigation was in Cimino itself. After the Cimino settlement in 1991, there were cases filed in New York, there were cases filed in California, we made two trips to New York, actually, it turned out to be rather protracted litigation for Fibreboard and rather expensive. We would get close to a judgment wherein we were trying to get the right to assignment established and Continental would settle with the plaintiffs directly, and then we would lose the benefit of the rightness of that controversy and have to go to another forum. So we went

through six or seven pieces of litigation, including preemptive litigation brought by Continental in the Norther District of California before Judge Peckham, but he deferred to the local district courts and so that never went anyplace.

All these lawsuits, by the way, were required by these agreements. We would take the agreement to Continental, they would object to it, and then the agreement with the plaintiff would require fibreboard to get a court order approving the settlement.

Q. All right. And typically the litigation sought a declaration that Fibreboard was within its rights to make an assignment settlement?

A. That's correct.

Q. Did Fibreboard eventually obtain a trial court decision on that question?

A. That was the Andres case that I have already mentioned in July of '92.

Q. Was there a writ taken by the insurers from the Andres decision?

A. I believe so, but I don't remember specifically. It was appealed.

Q. And eventually it was appealed?

A. It was appealed, yes.

Q. And very recently what happened to that appeal?

A. Very recently the Intermediate Court of Appeals in California has reversed Andres and has handed down a decision that Fibreboard did not have the right to enter into assignment agreements. That was just recently and, thankfully, after the April 9th agreement when the parties settled that dispute.

Q. Does that controversy in Andres continue to be an active matter in the reviewing courts in California?

A. Fibreboard has applied for certiorari in the California Supreme Court.

Q. I would like to turn your attention, if the court please, to the global negotiations.

[Laughter]

MR. MILLER:

Q. First of all, would you tell us basically in segments, or however it's comfortable for you to describe it, how, generally speaking, global negotiations proceeded?

A. Well, there were two phases. The first phase was commenced in 1990, not 1991, and essentially concluded about the time of the April 9th agreement that was entered into in connection with the Fibreboard suit against Continental arising out of the Ness Motley agreement. And then the negotiations after that involved Continental and were three-sided and ultimately involved Pacific. And those were included -- concluded here on August the 27th in the agreement in principle and ultimately in the definitive agreement in December of 1993. That's the agreement we're here on this week.

Q. Surely. Let's take the first step first, and tell us, if you've would, whether there were events

pursue this matter?

A. Yes. For the first time in early '91, I learned that Mr. Wartnick, Mr. Kazan and Mr. Motley and I believe Mr. Rice had retained Elihu Inselbuch.

Q. Did you discuss with these lawyers at some stage any concerns you might have had about keeping their colleagues in the plaintiffs' asbestos bar informed of developments?

A. We had a couple of meetings in the late winter/early spring, I think it was March of 1991. On their side, they said they needed more information and give Fibreboard a list and specification of things that they wanted, mainly having to do with claims-handling history and financial information.

On my part, I asked two things:

First of all, that they keep their colleagues in the plaintiffs' bar informed about our negotiations so there was noting --

there would be no surprises. And secondly, that they keep -- that they would keep in mind that never, under any circumstances, would Fibreboard pay any of its own equity in this deal.

Q. Did you inform Continental of your intention to explore with the plaintiffs' lawyers a possible assignment-based global resolution?

Testimony of Stephen Snyder, Fibreboard counsel Tr. 227-234

on a price term at that time, what happened to those negotiations? In other words, why don't they result in an agreement?

A. I used a term at that time, I guess I still use it, called leakage. Fibreboard couldn't tolerate any leakage in the deal. Fibreboard would spend the 278 million it had, and it would have to fight to get that, but it couldn't allow for any additional liabilities in the structure of the deal. When we started talking about leakage issues, opt-outs and contribution and indemnity claims, it became a big problem. We sat down and tried to figure out how to value, for purposes of crediting back to Fibreboard, future opt-outs particularly, and we realized that we didn't know how to place a value on a future opt-out, because not even the future opt-out would know in many cases whether they would have ever a claim or not. So that became almost an impossibility.

And when something like that becomes difficult to evaluate, in the context of these negotiations which were pretty hard fought, it magnifies in scope. I mean, I was looking at those potential liabilities as quite large. And Elihu Inselbuch was trying to convince me that they weren't quite large. And I wasn't going to be convinced about that. The same was true of the contribution and indemnity claims. Contribution and indemnity had not been a problem in the litigation up to that time. But post-Asbestos Claims Facility, we had a conduct on behalf of some defendants, like Owens-Corning Fiberglas, was suing a lot of people for contribution and indemnity. And I didn't know where that was going

to lead. And so I couldn't get comfortable with the fact that if Fibreboard accepted some percentage responsibility for contribution and indemnity claims in that structure and couldn't get nailed down the value of the opt-outs, that Fibreboard could not afford the settlement. And Mr. Inselbuch would not ask the class to take that responsibility. And we reached impasse. And basically our settlement talks stalled sometime in early 1992 because of it.

Q. Did you give CNA your views about whether this was a desirable arrangement in price?

A. I think it was sometime in early '92, in an effort to jump-start this processing again, I wrote Mr. Inselbuch a couple of letters to see if I could interest him on different structures. And we also went to Continental to tell them that we thought that it really would be in their interest to take the entire responsibility for the deal, accept the $2.1 billion liability, and settle out as part of the global. I couldn't interest Mr. Inselbuch on the one had in an altered structure; I could not interest Continental in that proposal, although we did get a letter out of Continental, I think it was in early '92, to the effect that Continental, if it were permitted to negotiate, would put up a nominal value of $1.5 billion for all the present and future pre-'59 cases, subject to the outcome of the coverage case. Which means that the billion five would go away if it won the coverage case. And that was a nonstarter, and we didn't have any more talks on that basis.

THE COURT: You're still talking about an opt-out arrangement at this point?

A. I have not idea what arrangement Continental had in mind other than the 1.5 billion.

THE COURT: Your conversations with plaintiffs was opt-out?

A. Yes. I did not have the bargaining tools necessary to carry the day on that point. But neither could I agree to the opt-out open-ended structure that had been placed before me and the price that had been demanded.

MR. MILLER:

Q. During the course, then, of 1992, did you find yourself in stalled global negotiations?

A. I think what happened in '92 was that I tried to convince everybody that global negotiations were simply adjourned. And Mr. Inselbuch tried to convince everybody that the global negotiations were dead and would never resurrect. I tried to convince people that the global negotiations were adjourned because it had such a salutary effect on the assignment program. People just flocked to us in droves to do these deals, if they had thought that there was an assignment deal coming. That was the good news. The bad news was they were also filing a lot of claims against Fibreboard to get in under some yet-to-be-determined deadline.

Q. By the end of the year 1992, Mr. Snyder, roughly how much of the debt, if you will, was outstanding, how much was owed asbestos claimants in settled cases?

A. I've tried to do the gross numbers on this under tab 3. I compare the defense. In 1988 to '89, '88 was only a three-month year, Fibreboard spend about $50 million in defense costs to get about $25 million in settlements. That was the period when we were trying to sell the structured settlement program on a case-by-case basis.

1990 was a little bit better.

Fibreboard spend $52 million, roughly, to get about $46 million in settlements.

When we ran out of money at the end of 1990, we had to flip this whole thing on its head. And so as is shown here on this exhibit under tab 3, we almost halved the defense costs. Be we had -- to about $26 million. Be we did assignment deals in the range of $26 million. And in 1992, particularly after it looked like we weren't going to be able to do a global and that the only way Fibreboard would get credibility with continental was through the assignment program alone, we actually almost tripled or more than tripled the assignment program, doing $943 million in settlements, and we yet further reduced the defense cost to $21 million. So that's where I get my conclusion that by the end of

'92, Fibreboard was in debt well over a billion two to the plaintiffs.

Q. Turning your attention to early 1993, Mr. Snyder, what did you consider to be your bargaining position with respect to Continental at that point?

A. Going back to the three things that we had on our minds in 1990, when we started the assignment program, in early '93 we had a new Pacific Indemnity deal which called for a 5.2 order but which could give us as much as $360 million, which I hoped would be enough for Mr. Inselbuch, if I got back to the bargaining table with him, for post-'59 cases. We needed a 5.2 order to ring the bell at that high number. And so we were in litigation against Continental in Texas in the Ness Motley deal in order to get that order.

The assignment program had been a very substantial success, and so we had over a billion two in settlements that we had done. But just as important, it looked as though we would be able to do as many of those settlements as we wanted in the future. And so that is something that we were aware of and I'm sure continental was aware of. And those two things gave us great leverage and great credibility with continental. We had enough money to pay for the post-'59 cases in a global negotiation, and we had a settlement vehicle that was very unfriendly to Continental that could keep us out of trouble in the litigation and alive long enough to get to the coverage case result.

And the final piece was -- well, and the capstone of the assignment program obviously was the Ness Motley deal. That was a 20,000-case settlement entered into in December of '92. That case was a national case processing agreement, it was in litigation in Tyler, Texas, and fibreboard was seeking not only a 5.2 order in that case, but it was seeking a ruling from the court that Fibreboard's assignment program was legal. The court in California had already agreed with that, but in California a trial-court judgment is not enforceable while it's on appeal. So we were looking for a federal court judgment.

The Ness Motley negotiations provided that the Ness Motley cases, if there was a global, would fold into the global, they would be consumed by the global. And so we were in very credible negotiations with -- again, with Mr. Inselbuch, by this time Mr. Rice and Mr. Cox, Mr. Wartnick and Mr. Kazan to do a global. And in fact we had a draft of definitive agreement that we were working on in February or March. And that was a real possibility, because it looked like we had the money. In the Ness Motley settlement, we had ironed out some of the problems with contribution and indemnity. We had also done that in the Baltimore settlement. And there was a good chance that we would be able to sign a global on an assignment basis. We had those three things going for Fibreboard in early 1993, as we approached a judgment day in Tyler, Texas, in the Ness Motley declaratory relief action against Continental.

Q. What, in early 1993, was the situation with respect to Fibreboard's ability to pay defense costs and the interim agreement?

A. The interim agreement expired at the end of 1992, by its own terms. I make a frantic effort with plaintiffs to get them to sign some sort of global agreement before the term of the interim agreement, but they wouldn't do it. The reason I was concerned about that was that when the Andrus case had been decided in July of '92, we immediately got a letter from Continental saying that in light of the Andrus case, they now would provide a complete defense. I thought that as long as the interim agreement was in effect, that was not a credible position for them to take, because we were still being capped, our lawyers were still being capped in their fees. But that after the interim agreement was over, I felt that there might be a new set of legal principles that

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for your cross-examination of this witness is to establish that his assigned value to this company is low. Correct?

MR. BARON: I believe that's what I'm doing, Your Honor.

THE COURT: And your contention is that he is low by how much?

MR. BARON: Your Honor, he's probably low by somewhere between 40 and $50 million.

THE COURT: All right. Why do I need to hear any more on that subject?

MR. BARON: Got another subject to raise with him, Your Honor.

Q. Mr. Abbott, I've been waiting for this opportunity --

[Laughter]

THE WITNESS: Mr. Baron, is this Abbott exhibit 1?

[Laughter]

MR. BARON: Your Honor, by the way, I would move into evidence the prior two documents that I handed Mr. Abbott.

THE COURT: Those are numbered --

MR. BARON: Well, I think we should probably renumber these documents. They were

Testimony of Clark Abbott, investment banking expert Tr. 299-300

THE COURT: Is this still on your 40 million point?

MR. BARON: No, Your Honor. Your Honor, they put on 40 minutes of direct examination on this witness. I think I'm entitled to do cross.

THE COURT: You're doing cross. That's exactly what you're doing. I'm just trying to find out where you're going and

what you're after and whether it makes any difference. I mean, I may agree with you on the 40 million. And if that's all we're going to establish with this witness, let's get back to Mr. Snyder.

MR. BARON:

Q. Mr. Abbott, on page 3, where the company is describing their asbestos liabilities, they state, "Either the global settlement or the separate insurance settlement agreement should resolve all personal injury asbestos liabilities with an existing insurance established for reserves." Do you have any information that would indicate that's false?

A. Where are you, sir?

[Laughter]

MR. BARON:

Q. Last full sentence under the section on asbestos.

A. I don't have any information that would indicate it's either true or false.

Q. The next section is on asbestos in buildings. Did you attempt to evaluate the status of Fibreboard in terms of potential liability for property damage asbestos cases?

A. I considered it in doing my valuation, sir.

Q. All right. In the statement that Mr. Roach makes, he states: Fibreboard's asbestos in buildings litigation continues to decline; there are only 16 pending cases which have not been resolved. And then he recites that he has 175 million in confirmed coverage with as much as 245 million in additional coverage. Then he says based on his experience, claims can be resolved for a fraction of that amount. What deduction, if any, did you make from the value of this company for their property damage liabilities for asbestos?

A. Basically I took no deduction, although I did spend a fair amount of time on this subject in my interview with the company.

Q. Based on your interview of the company, based on your review of the records of this company, do you believe today that Fibreboard is a healthy company, ex-asbestos liabilities?

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issues that had, I guess, bedeviled you in your early attempts to get a global arrangement put into place, how did the Ness Motley negotiations enter into your thinking about ways to approach the global?

A. The global negotiations broke down over opt-outs and contribution and indemnity. Contribution and indemnity was a very big issue in the Baltimore litigation because of pro tanto releases, Swaggart releases, things that were very difficult for me to understand, but also made it very difficult for me to settle the cases because of contribution and indemnity issues. We started working on a solution to that in the Baltimore settlement, and we continued with that in implementing some of the things we developed in Baltimore when we picked up he Ness Motley Settlement. We also worked on -- we also worked on the opt-out issue with regard to present and futures, which had been a problem; and we worked on significantly at this point valuation of cases. Because if we were going to do a Ness Motley deal that rolled into a global, then the price of that agreement certainly was going to become a factor in any global negotiations.

Q. When you were negotiating with the Ness Motley firm at the time, how big of a factor were they for Fibreboard? What percentage of the cases across the country did they control or were they involved in?

A. To one extent or another, it appeared they were involved in about 50 percent of all cases brought against Fibreboard across the country.

Q. And did you anticipate that whatever was done with regard to pricing the Ness Motley settlement would have some carryover effect or implication for any global arrangement you might be able to put together?

A. That was true and basically in an outgrowth of the agreement. If you read the Ness Motley agreement, it says that the -- that the parties that are settling in the Ness Motley deal will

accept a global settlement or that Mr. Rice would negotiate an inferior settlement.

Q. Now I would like to bring your attention, and the court's, to early 1993. You have told us the position you found yourself in. And I want to direct your attention to a status conference that was being conducted in Tyler in the February/March period of time. Do you recall that?

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was still of the opinion that we were fairly close.

Q. All right. And indeed within a matter of days before April 9 agreement was eventually signed, did not give some rather direct representations to Continental about the imminency of a separate global assignment with the plaintiffs?

A. We had a definitive agreement drafted, we had some terms that were still under discussion, but we certainly got a lot farther down the road with regard to this agreement than we had been in 1991.

Q. All right. So armed, as it were with what you thought was an imminent assignment based on the global with the plaintiffs, you turned to the April 9 agreement. And I would like for you to tell us from your perspective what it is basically that Fibreboard got in that agreement and basically what it was that Continental gave.

A. We reached a compromise --

MR. MILLER: Wait a minute.

[Laughter]

MR. MILLER: I'm sorry. You had to give something up to get it, Mr. Snyder.

Q. Would you tell us what that was?

A. We had several meetings with Judge Higginbotham. We had several meetings in Dallas where Judge Higginbotham was -- his office is, Fifth Circuit, and I believe it was at the law

firm Vinson & Elkins there. Those meetings went late into the evening, they were fractious, they were contentious, sometimes they were downright nasty. What was most difficult in my perception for Continental was making the commitment to get the global and have it include all the cases, particularly the language, the best-efforts language, which was I believe viewed by them, I know it was viewed by me as a standard that could be judged in the courts and by which they could be held.

What was troublesome for Fibreboard was trying to determine whether it had enough to justify giving up what it had. Because when it got the best-efforts obligation of Continental, it had to give up its right to do assignments, which it did; its right to do a separate global, which was not a bird in the hand, but it was a lot closer than it had been in 1991, which it did; and it had to accept a, in effect, a fuzzing of its rights under the agreement. Fibreboard continued to be obligated to seek the 5.2 order, but the structure of the April 9th agreement was such that Continental essentially supplied equivalent value for that, thus diluting Fibreboard's economic incentitives to get a 5.2 order. So Fibreboard found itself on both sides of that line.

And finally what Fibreboard -- after giving that up, it got the best-efforts commitment and it got a basic commitment on the part of Continental in the interim to fund the defense of the cases. And by that I mean something that was -- that got rid of the disputes we had about defense of the cases. And by that I mean something that was -- that got rid of the disputes we had about defense camps and the matrix-type hourly rate thing that had been imposed upon the Fibreboard lawyers.

Q. How, from your owner perspective, did you evaluate what you had obtained in the April 9 agreement?

A. If you assume that the best efforts obligation was meaningful to Continental, it was an extremely important step for Fibreboard.

Q. Why?

A. It meant that for the first time there was no difference between pre- post- '59 cases, for purposes of Fibreboard's planning for the future. Instead of looking at how Fibreboard could husband resources now to pay for the post-'59 liabilities, Fibreboard totally shifted its focus and determined to dedicate itself totally to supporting Continental in getting a global. Because the way the agreement read, if a global was achieved, and only if a global was achieved, then all of the liabilities would be paid for by Continental. If a global was not achieved, then that -- then the parties would fall back on their coverage rights.

So for purposes of going forward and getting a global, Fibreboard had a commitment from a very large debtor to pay for all the cases. And therefore, if that was good promise, one that would be kept, Fibreboard had a commitment from a very large debtor to pay for all the cases. And therefore, if that was a good promise, one that would be kept, Fibreboard had achieved its goal.

Q. After the April 9 agreement, how did your efforts and the focus of your negotiations change?

[Laughter]

A. -- and the plaintiffs in getting a global. And I became kind of a friend of the premises at that point.

[Laughter]

Q. You were friendly but substantially disarmed, is that clear to say, Mr. Snyder?

A. Well, Fibreboard no longer had any leverage in the equation to speak of excerpt the continuing obligation it had from Continental to use its best efforts. But Fibreboard had knowledge of the cases, it had an understanding of what the negotiations had been in '91 and '92, and if I thought that the plaintiffs were demanding too much in the negotiations, I was quick to point that out to them and to remind them of positions they had taken earlier. And if I thought Continental was digging in its heels and had been sending inconsistent messages about values and negotiations, I made that plain to them, too.

Q. Even though you had reached this agreement, what was the situation with regard to your obligations as to a 5.2 order under the Ness Motley deal?

A. That continued. And that litigation didn't go away. It was pending. And Ness Motley -- we had litigation that had to be resolved. And so we had to attend the Ness Motely -- to finishing whatever had to be done in the Ness Motley deal under the terms of that agreement.

Q. Do you recall a meeting at the Caplin & Drysdale in Washington in May of that year?

A. Early May, yes. In Washington, D.C.

Q. What did I say? It was late April. I'm sorry.

A. Late April/early May.

Q. Well, my fault. I said May. Again, the details of the meeting are confirmed in the documentary materials. But would you tell us, were there a proposal made on the date? And what happened to that proposal?

A. Up until that time, I had joined with the Continental people in urging the plaintiffs to take seriously the possibility of restarting the global negotiations and getting quickly down the line. Keeping in mind that the California Court of Appeals was getting into the business of hearing argument and we were looking at a closure if at the court of appeal level sometime in 1993.

We were able to set up a meeting with the plaintiffs at Caplin & Drysale, I think the last day of April/the first day of May in 1993, and Mr. Wachtell spoke on behalf of Continental and Fibreboard. All of the first day of the meeting essentially laying out in great detail the position that Continental and Fibreboard were taking in the global negotiations; and then early the next morning we reconvened and after being invited to by the plaintiffs, Mr. Wachtell presented an offer.

Q. Was Pacific Indemnity there?

A. Pacific Indemnity came or was invited to and tried to come to the second day.

[Laughter]

Q. When the offer was being made?
A. When the offer was being made, yes.
Q. Did they get there in time?
A. The meeting only lasted five minutes, and they were late.
Q. Tell us the offer and what happened.
A. It was -- it was a structure totaling $2 billion for all present and future cases, said to be of present values at some lower number, I don't know what it was, but obviously if fairly discounted over time it was substantially lower number. Presented as a serious, non-negotiating offer by the defendants to -- to enter into a mandatory global settlement.
Q. You say it was presented as a non-negotiating offer?
A. As not a negotiating offer, yes. It was not presented as a non-negotiable offer, however.
Q. I understand. What happened when the plaintiffs heard it?
A. They left the room and two minutes later they came back and said that they rejected the offer and the meeting was over.
Q. Following --
A. And then they left the room again.
Q. Did you then make some effort to put together a bilateral, so-called, insurance settlement following that meeting?
A. A couple of things were going on at that time. We had available to us Judge Higginbotham's offices. We were still working with him in connection with the Ness Motley deal. He was still listening to us about global matters. And so on one front, I think we prevailed upon him to try to assist the parties in -- in putting something back on the global front. And I think there was a certain amount of depression and despair on the Fibreboard/Continental side. So we did discuss the possibility of perhaps Continental buying out the Fibreboard policy and then Fibreboard would do what it could either to do its own global or simply go off on its own.
Q. And what happened to those discussions?
A. We had meetings in New York, we had a meeting in San Francisco. They were very unproductive meetings. In fact, you

know, it was -- it would have bene better had the meetings never occurred for the ability of Fibreboard and Continental t o work together. And it was very clear that we weren't going to be able to do that sort of deal.
Q. Now, at that time in the year, what were the major open issues, if you will, the unresolved issues that needed attention with respect to any possible global?
A. I think there were four issues.

1. We wanted to negotiate with somebody. And we had difficulty getting that accomplished.

[Laughter]

2. There was price.
3. There was structure.
4. There was Pacific Indemnity which still had not come to the table

Q. And leaving aside the problem of finding someone to negotiate with from the plaintiffs' side, I want to sort of walk you through those issues.

Price, first of all. After the unsuccessful meeting, what --

THE COURT: I don't understand. Talking about price of what? You can't be talking about price of the global, because he doesn't have anybody to negotiate with.

[Laughter]

THE COURT: Are you talking about the price of the buy out?

MR. MILLER: I am, Your Honor, talking about price issues related to the global which still sprang hopeful in Mr. Snyder's heart.

THE COURT: Well, in your meeting where the plaintiffs walked out, I believe this is the first time they waled out, wasn't it?

THE WITNESS: Yes, first --
THE COURT: First walkout?
THE WITNESS: First walkout.

[Laughter]

THE COURT: Was that articulated by them to be based on price problem or structure problem? I assume structure. Or both?

THE WITNESS: It was a -- it was a broadly-based price and inability to deal with you people kind of an objection. I recall, for example, a letter that Mr. Kazan wrote to the court, it was either Judge Higginbotham or Judge Kawaichi, where he took umbrage at one of our representations to the court in Alameda County that there even existed the possibility of global negotiations. He made it clear that there was not such thing -- this was in May, I think, of '93, and he thought that we were misrepresenting the fact of even the existence of global negotiations. He didn't get along with Mr. Wachtell, and he didn't think that he could deal with him. So it was price, personality, structure.

THE COURT: The usual reasons?

THE WITNESS: The usual reasons. And I think there's a -- I honestly think there is a -- it was going to take some time for particularly the Wachtell Lipton people to start to understand the asbestos plaintiffs' bar, too. This was a very powerful, almost arrogant, in some way, group of people because of the successes that they had enjoyed over the years. And they were in their own way tough to deal with, too.

MR. MILLER:

Q. Focusing on this price question for just a moment, Mr. Snyder, was there a renegotiation of the Ness Motley deal sometime in this period of time?

A. I think if I can since the sequences a certain way, it won't seem as odd as it may to His Honor.

THE COURT: I didn't say this seemed odd. It's quite what I would have expected.

[Laughter]

THE WITNESS: Well, I agree with Your Honor that we had to find somebody to negotiate before we could have terms that divided us . And the way we got through that was through

Judge Higginbotham and through the Ness Motley deal. Judge Higginbotham, I think, and I both shared the view that this business of the plaintiffs refusing to talk to Continental or Fibreboard was itself a kind of bargaining, in a manner of speaking. They had been -- they had been given the opportunity to walk out, after seeing some money from Continental, and they weren't going to come back until they saw some more money from Continental, but they would come back.

Through Judge Higginbotham's offices, meetings were held, position papers were written, and I think through the -- a process of several meetings, not with -- not with Mr. Inselbuch and not with Mr. Wartnick or Kazan, but with Mr. Rice and Mr. Cox and Judge Higginbotham, it became clear that yes there might be some more money available.

And so I think that after we got through July, certainly, it became clear that we did need to get the Ness Motley deal done, because it was going to trial in Texas, but we also could restart the global negotiations. And when we did restart those negotiations, those were the three big issues: price, structure and Pacific Indemnity.

MR. MILLER:

Q. Was there a renegotiation of the Ness Motley deal that summer?

A. Yes, It intensified in July and came to a head late in July or early August. And was settled.

Q. Who renegotiated the settlement agreement with the Ness Motley firm, and why was the new agreement any different than the old agreement?

A. Well, the new agreement. And it took the assignment element out of the deal. And now the Ness Motley agreement became a three-party deal. In the April 9 agreement, Fibreboard had agreed with Continental that it would cooperate with Continental in converting these assignments into the three-party deals. Ness Motley was just one of those deals that we were working on. We were working on a whole number of other ones. That there-

fore took the risk out of Ness Motley that was associated with the assignability issue and the validity of the assignment issue. It also included a cash component, 50 percent. That took the risk to the plaintiffs in that deal that they would at least as to 50 percent get their money. So we renegotiated the structure and the terms and the price based upon those new values being put into the mix.

Q. Now, the renegotiated agreement presumably covered some approximate number of cases, and there was nominal price, too. Correct?

A. There was a pre -- there was a pre-'59 price based upon disease categories, and the post-'59 price was based upon the old point system. And I think that the renegotiated price, when you mixed all those two together and looked at the probable disease mix and not taking into account the fact that a certain percentage of those claims would not get paid --

Q. The first question, the nominal value per case, to start with.

A. Nominal value per case, when you mix all that together, is about 10 to 11 thousand dollars a case.

Q. Now, did you, in your own mind, do some valuation work to determine the, in quotes, price or value, however you would want to say it, absent the contingencies and uncertainties present in that agreement still at that time?

A. Well, I think it's fair to say we did more than that. The Ness Motley negotiation was becoming a stocking horse for the global on price. And we needed to have our own understanding what the implications for a global price would be coming out of the agreement. I believe that a Ness Motley deal in the range of 10 to 11 thousand dollars melded value would translate in a cash market, with no risk to values, in the seven to eight thousand dollar range. That's about $2500 more than I thought the cases were worth under a system, but it is -- was a reflection of the bargaining leverage that the plaintiffs had in those negotiations.

The way I got to that figure was I reinserted some percentage for zero pays. Historically, Fibreboard had been running

about 40 percent of its cases were Fibreboard was given dismissals for no -- payment of no money. I assumed that Ness Motley, because it was the kind of deal that it was, that a much lower percentage would be true, so I took that to be 15 to 20 percent. And then there's the discount for the payment of cash. And that I took at another 15 percent. If you apply those percentages to those numbers, I think you get down to about $7500 a case.

Q. Turning to the structure question now, were there developments or was there progress during the course of the summer with respect to the structure for a potential global deal?

A. Yes. I think as late as July, I still believed that -- well, there are two structural issues, presents and the futures, and mandatory opt-out. Certainly until sometimes in August, maybe even the middle of August, it wasn't clear whether this was going to be just presents or futures or whether it was going to be just futures. With regard to mandatory versus opt-out, I thought I saw some flexibility on both sides until mid to late July, when it became clear to me that the Continental lawyers had no confidence in our ability to solve the leakage issues with regard to futures. They've treated that as a total wild card. They would never be able to receive that value of an opt-out post-card received from a plaintiff and they were not going to allow that to occur. And I think they made it very plain to everybody by the end of July that this had to be a mandatory class. And if that meant that that changed the price, then that's what it meant. And we would have to negotiate on that basis. And they certainly convinced me by the end of July, and it wasn't much after that they had convinced the plaintiffs, I think.

Q. And on the question of a presents, futures, one or the other, when was there progress on that issue?

A. We got the strongly-worded views from judge Higginbotham that he thought that a present and futures deal was simply too complex to be sustainable in the negotiations. I think that was based on his judgment of just how poorly we got along in our negotiations. But even after he said that, and I think he said that

about the time that Ness Motley agreement was finally renegotiated in early August, I think it was about the 5th of August, even after that time it was clearly the position of the plaintiffs that they would accept a futures only or a present and futures, and it was our position that we would do it either way. But what kept confounding us was our inability to come up with a value on the presents, because the presents had become such a moving target. And Fibreboard -- that is to say, Brobeck, who was the bean counter, basically, had the bean counter role on that issue -- couldn't keep track of the new cases that were coming in. We were getting cases in huge buckets being filed against Fibreboard at that time. You know, I think that the maritime cases came in at over 13,000 all by themselves in 1993, and we simply couldn't get everybody comfortable that we could answer the question how many present cases are there.

So as August wore on and negotiations wore on, it became clear that we weren't going to be able to handle the presents in this structure.

Q. And before agreement was finally reached on the issue, where did things stand with respect to Pacific Ideminity and contribution or sharing with Continental?

A. I think this was the most troublesome term in the entire negotiations, because Continental's stated position, and it was never equivocal on this, was that it would -- whatever it agreed to in negotiations would be conditioned upon an acceptable contribution from Pacific Indemnity. And Continental got to decide what was acceptable. And there was no way that we were gonna get even close to the plaintiffs' bottom line as long as that was a condition, because it was clear to them, and they stated this, that they would give a number and then that would start another negotiation with Pacific Indemnity about how much lower than number would have to be to get Pacific to come in. And so they just wouldn't do it. And that 's where things stood in the middle of August. We had meetings in Dallas were I recall siting out in the

hallway for four or five hours at a time while the plaintiffs and Continental worked on this. Because Fibreboard could not

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dollar. Assuming there was no gap. And indeed within a few days, we were told that the plaintiffs were seeking the offices of Judge Parker to hear us in Tyler, Texas, to negotiate price. And we came to Texas, I think, on the 25th or the 26th, I don't know, but it was like a Wednesday or Thursday of that week.

Q. And I've forgotten frankly whether you have told the record. On what day was a coverage decision possible?

A. 27th, Friday, in the morning.

Q. Would you describe in as much detail as you think it needs what happened after getting to Tyler and before the matter was spread on the record?

A. We spent most of the afternoon in court right here in this courtroom trying to negotiate the price and learning from the plaintiffs that no matter what the deal, if the price term was reached plaintiffs would insist that Fibreboard do some kind of a backup trilateral as a fail-safe in the event that the global didn't work for some reason.

Q. When you say a backup trilateral, you mean a backup agreement between Fibreboard and its insurance companies?

A. Yes. Resolving the coverage issues.

Testimony of Stephen Snyder, Fibreboard counsel Tr. 335-337

were getting close and we all sat around the dining-room table and confirmed what everybody's views were, and we spent that entire evening trying to come up with some more money from the insurers. In fact, they did come up with 25 million more dollars.

Q. Now, the $10 million Fibreboard contribution, bearing in mind what you have told us was Fibreboard's goal for years, would it be fair to say that that was money that originated with or from an insurance company?

A. All but about half a million dollars comes from what was left of then-AIG/Home settlement. and that's the source of those funds.

Q. How long did it take you to negotiate the terms of what became known as the trilateral settlement?

A. That took most of the day the next day, or most of the morning the next day. Fibreboard obviously wanted the global. The global was triggering event under the April 9th agreement for Fibreboard to get all its cases covered. The demand of Fibreboard, however, from Continental was that it would pay no more for the trilateral than it was paying for the global.

Q. Period?

A. Period. Fibreboard's point was that if -- if the -- if the trilateral was all it had, it would incur substantially higher defense costs in the tort system and that money would nowhere be equivalent to what it would be in the global.

We got nowhere with that. And we therefore basically ate the defense component in order to get the global done. And we accepted that term. And that's the term that was laid on the record the next day, that the trilateral that ultimately was worked out would have the same price as the global, and that's what we agreed to.

Q. How long did it take to negotiate the final documents.

A. There were two -- there were three final documents

Q. I'm sorry. The trilateral.

A. Trilateral? We started negotiating it immediately after– the 27th, and we finished those negotiations with signings on the 12th of October, I believe. And--

Q. I'm sorry.

A. And again they were very contentious, difficult negotiations.

Q. We have the documents, of course, but could you tell us what happened to the Fibreboard policy with respect to any type of claim that might be asserted?

A. It turned out we simply had different perceptions of what was going on in the trilateral process that had to be ironed out. Fibreboard thought it was settling asbestos liabilities, Continental thought it was getting a complete policy buy out; that is, that the payment would totally extinguish the policy. Fibreboard thought it wouldn't do that except as to asbestos liabilities. And if Fibreboard had liabilities with regard to future lead paint litigation or petrochemical or environmental litigation, those piles would still be available. That was not Continental's view. And so Fibreboard had to agreed to a complete policy buy out.

Continental, I think, looking back to the contentiousness that we had about whether they were pushing hard enough for a global, insisted that on the signing of the global, the signing of global, that Fibreboard admitted that was full discharge of Continental's obligations under the April 9th agreement to use its best efforts to get a global.

Q. In other words, quit apart from court approval, disapproval or anything else

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THE COURT: What year, counsel?

THE WITNESS: That would be 1993, Your Honor.

MR. MILLER: I'm sorry. I didn't hear Your Honor. 1993.

A. Those were the trilateral agreements entered into between Continental, Fibreboard and Pacific Indemnity. They were the agreements that the plaintiffs insisted that we enter upon before we complete the global. Basically, they provided the mechanisms for the funding of the interim processing of claims and

what would happen under the different iterations of the global and trilateral. There are three possibilities:

First, that the global was approved.

The second possibility was that the global was not approved and that the backup trilateral would take effect.

And the third was that neither the global nor the trilateral were approved.

And the agreement death with what happened in each of those circumstances.

MR. MILLER: All right.

Q. With respect to the first possibility, that is to say, ultimate approval of the global, what, in

Testimony of Stephen Snyder, Fibreboard counsel Tr. 379-385

what is out of that $1.3 billion fund. So there is some -- yes, some uncertainty about that, yes.

Q. Would you give us your perspective from the standpoint of Fibreboard, if you will, about which of the resolutions are possible here, is preferable?

A. Well, certainly from the standpoint of Fibreboard, and I would think from everybody's standpoint, the global is a superior resolution.

Q. Would you please tell us why and give us as much explanation as you think it necessary?

A. The -- the major issue, the major difference between those two situations has to do with the amount of dispute and transactional costs that will be in the system. In the trust situation, because of the way that the trust is designed , we're all hopeful that the expenses of administration and defense will be kept within the 10 to 15 percent range that we've relied on experts to advise us on. There is some evidence in other similar circumstances to suggest that that is a -- is a reasonable estimate. And we're hopeful that we can stay within that range. We already

know what happens in the tort system. In the tort system, we -- well, also under the trust, obviously, the plaintiffs' counsel fees are limited to 25 percent. So we're talking about appreciable extra value delivered to claimants in that system.

In the tort system, we know, and one of the purposes of my going through the Fibreboard defense costs yesterday is that it is not unusual to see the defense costs equal and be at the same level as the indemnity payments. In the years 1998, '89 and '90, when Fibreboard was defending claims to set values and was keeping the value in the 5,000 to $4,500 range, where I think it belongs, Fibreboard was spending more money on defense than it was spending on indemnity.

THE COURT: Let me make sure I understand what you're saying. From a claimant's perspective, under the proposed global there is a finite amount of money with the presumption being the transaction costs can be limited to 15 percent, and costs to claimants as far as attorneys' fees are concerned are by the terms of the agreement limited to 25 percent, compared to the trilateral, where attorneys' fees to the claimants are controlled by the contract with their lawyer, which historically has ranged from one-third to 40 percent. And the fund, while it would be the same amount of money, would be subject to depletion of defense costs, which if history is a guide, could approach an equal amount to indemnity.

THE WITNESS: That's correct.

THE COURT: And could impact on future claimants by subjecting the fund to punitive awards to early claimants.

THE WITNESS: That's correct.

THE COURT: Is that a fair summary?

THE WITNESS: That's correct.

THE COURT: Are there other elements that you deem significant, looking at it from a claimant's perspective?

THE WITNESS: I actually have calculated these values under tab 1 of the notebook, believe in the specific situation of Fibreboard, if these relationships hold true, that the green area in

the chart that Your Honor has before him describes what the plaintiffs and claimants would get in the trust situation because of all of that defense money that's being transferred over.

THE COURT: Over twice as much?

THE WITNESS: Over twice as much. And that that 1,046,000,000 that would be available to claimants in the trust situation would be reduced to something in the neighborhood or 460 million in the tort system, mainly because of the cost of defense. One of the truly, I found, sunrising things about this, when I was doing these calculations, in '92 and '93, is that even though the plaintiffs' attorneys reduce their fees -- and I'm assuming the fees and costs total 40 percent here, if you include the cost of running the case -- is that the plaintiffs' attorneys --

THE COURT: Now, running a case is a word of art some places.

[Laughter]

THE WITNESS: I'm sorry. We don't run cases in California.

[Laughter]

THE COURT: I assumed you were talking about --

THE WITNESS: In terms of preparing the case. Preparing the case and paying for the experts and the doctors.

THE COURT: History reveals, does it not, that many times it's 40 percent plus cost?

THE WITNESS: That's correct, in some cases it is. I've simply assumed, for purposes of these calculations, that it's 40 percent. And the bottom line is that the plaintiffs' attorneys, if to indemnity.

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under the trust because of so much money -- defense money that has been saved and transferred over onto the indemnity side.

THE COURT: Well, let me take it a step farther then and inject the perspective of Fibreboard. If I appreciate this correctly, it's -- it's an even deal as far as Pacific and CNA is concerned. They've cut a deal either way and they go home, assuming that it stands up. So it's appropriate then to consider impact on Fibreboard.

THE WITNESS: Yes

THE COURT: Now, from a claimant's standpoint, under the trilateral, at some point when the money runs out, you have whatever Fibreboard is worth --

THE WITNESS: Yes.

THE COURT: - added to the equation.

THE WITNESS: Yes.

THE COURT: The other side of that coin is, you have a total wipe-out of investor equity and the elimination of however many jobs Fibreboard provides, and whatever taxes they pay, and you write off yet another business entity to the asbestos scenario.

THE WITNESS: That's correct. No. 19, I believe. Your Honor, on the other question, adding the corporate equity, there's another chart under tab 1, the next one, which changes the question a little bit and asks: How much would it cost Fibreboard to generate $1,046,000,000 in indemnity to the claimants in the tort system? That's relevant to the question of how much Fibreboard equity would have to be added to make the claimants come out as well as they do under the trust. And the answer that I come up with, when I do these numbers with these different percentages, is it's going to cost $3.4 billion.

THE COURT: I don't understand that. Go through that with me.

THE WITNESS: Under the trust, the billion five -- three five -- provides to the claimants, in my view, a billion forty-seven net dollars to them after all costs. The tort system only provides 460 million after all costs. The question is: Looking at

it from the perspective of a claimant, how much does Fibreboard have to be worth in order to make the trilateral situation at least as valuable to the claimant as the trust? The answer to that question is: Fibreboard would have to be worth enough -- Fibreboard would have to be worth $1.9 billion in order to make those two situations equivalent, in my judgment, because the costs in the tort system are so high that even if you add $250 million on top of the 1.5 billion, or the 2 billion, the claimants only get an average 30 cents on the dollar out of that. And you have to add a lot of dollars to equate with the quality of service and value that's being delivered by the trust. That was why I think from Fibreboard's perspective, as well as the claimant's perspective, the trust is a better agreement, because the claimants are going to want a billion forty-seven million dollars and they're going to try to get it. And even though it's my view that Fibreboard can use that money to defend itself, the only way that's going to happen is if Fibreboard spends a lot of money on defense and if it persuades the plaintiffs to accept a lot less for their cases. And I've already said that I think that those values have got to go down to the $5,000 a case range. And they're at the $11,000 a case range right now. And Your Honor has been around this litigation a lot longer than I have, and he knows exactly what it's going to take to make that happen. There's going to be a lot of fighting going on.

MR. MILLER: Your Honor, mindful of the

Testimony of Stephen Snyder, Fibreboard counsel Tr. 389-390

understanding about what they were to be paid in connection with their work?

A. I never did.

MR. MILLER: Your Honor, I attempted to ask the witness, and perhaps I should, in all safety, whether I have forgotten to ask him anything.

[Laughter]

THE COURT: You probably have. I have one other area of inquiry.

Back to the conversation you and I had a moment ago about comparison between trilateral and the global, if we -- if we inject into that one other potential scenario, and that is Chapter 11, one would think that if the global is not approved and the trilateral goes into effect in X amount of time, whether that's three weeks or three years or six years, it becomes apparent to whoever is calling the shots that Mr. Roach's statement was in fact optimistic and that there's not going to be enough money, and assuming the Chapter 11 becomes an option, have any of these companies that we're all so familiar with that have gone that way successfully negotiated a Chapter 11 arrangement that resulted in an acceptable level of assets going to claimants and survival of the company in a meaningful way?

THE WITNESS: In my judgment, from the point of view of corporate management, none of the Chapter 11's have accomplished that.

THE COURT: JM being the first to try that, essentially, if my memory is correct, the company was turned over to claimants.

THE WITNESS: I think that's the general perception, yes.

THE COURT: And the money then ran out?

THE WITNESS: And even that wasn't enough, that's correct.

THE COURT: Have there been some of the more recent ones -- I mean, are you familiar with what Celotex's prospects are? Has it depended on the litigation they have pending or --

THE WITNESS: The Celotex and the Keene, the Raymark, and I can't speak for the Eagle-Pitcher bankruptcies, have all gotten tangled up in issues having to do with corporate reorganizations and the claims of the

claimants, that those assets were secreted or disappeared before the Chapter 11 was even filed and that what was taken into Chapter 11 was a mere empty husk of the company, and that July 21, 1998 those assets were actually moved out of harm's way by corporate reorganization. And I don't think any of

Testimony of Stephen Snyder, Fibreboard counsel Tr. 399-402

and therefore have brought about a benefit of the $2 billion fund?

A. They've said that, yes.

Q. And where the court to find that application to be meritorious and award any such fee, that money would have to come out of the 2 billion as well. Is that correct?

A. I'm not sure I agree with that. But I -- I know that that certainly will be the position of some parties.

[Laughter]

MR. WACHTELL:

Q. Let me word it -- let me word it this way. Is there an agreement by either Fibreboard, Continental or Pacific to pay any such fee?

A. No.

Q. Mr. Snyder, going back, how many -- we've talked about punitive damages at times. What has Fibreboard's history been in terms of the number of punitive damage awards that have actually been granted against it and what has happened to such awards?

A. I don't believe Fibreboard has ever paid punitive damages in system. There may be an exception of one case in West Virginia where that was done in a $40,000 punitive damage verdict.

THE COURT: In settlement?

THE WITNESS: In settlement of a verdict awarding punitive damages. The number of verdicts can be counted on the fingers of a single hand. The first was the Alameda County verdict of Mr. Kazan in the Bell case, then the single West Virginia case, a $40,000 verdict. All the other verdicts have been in connection with these large trials where Fibreboard was, in my judgment, tarred with brushes that really should have related to other defendants; but those were Cimino, the West Virginia Denver Turley cases, and the Chatham cases in Houston. And those are the five verdicts that have awarded punitive damages against Fibreboard. And I believe on only one occasion, the $40,000 verdict was an amount paid in respect of punitive damages.

THE COURT: Well, have each of the large trials that resulted in at least some punitive verdict been resolved by settlement agreement by assignment?

THE WITNESS: Each and every one by an assignment settlement that since I believe has been converted into a three-party agreement.

MR. WACHTELL:

Q. And how many -- what has Fibreboard's experience been in terms of verdicts in excess of $500,000 for a particular claimant?

A. I don't have -- well, that's a rare occurrence. And it is difficult to base a judgment on Fibreboard's exposure based upon the verdict alone. I know that Fibreboard's settlements in amounts over 500,000 are -- I believe they're not more than 10, may 12.

Q. Are you talking about settlements after verdict?

A. Settlements after verdict. I mean, I believe all those settlements were after verdict. But I couldn't tell you with a hundred percent certainty that was so. And I believe there's only been 10 or 12 or those. And I think most of them were Oakland, California, settlements.

Q. Now, what has the experience been with contribution and indemnification actions being brought against Fibreboard after it left the ACF?

A. Those have been rare.

Q. There have been such actions brought, though; is that correct?

A. There have been contribution and indemnity actions brought with increasing frequency since the ACF, But I do not believe that there's ever been a judgment or a settlement contribution or indemnity.

Q. Essentially they haven't been pursued?

A. They've been brought, I think in some jurisdictions you have to bring them in order to preserve your right to a credit; and they've been pursued, Owens-Corning pursues them; but they have never come to closure.

Q. And with respect to joint and several liability under the tort laws of certain states, would it be correct to say that the existence of that liability has in fact been within historical settlement values that Fibreboard has agreed upon with various plaintiffs?

MR. BARON: Your Honor, it's really reaching a point where the leading is going too far. If we could get a question, it would be much easier.

THE COURT: Counsel, I have encouraged leading. It's a nonjury trial, we have a lot of evidence to get in. I encourage leading. Proceed.

A. I believe that's factored in, I believe punitive damages exposure is factored into the settlement values.

MR. WACHTELL:

Q. Now, can you recent for us the negotiations

<u>Testimony of Stephen Snyder, Fibreboard counsel Tr. 448-451</u>

Q. Well, in terms of you, for paying a claim or settling a claim, would it be a general statement that Fibreboard only pays

claims after they've been satisfied that the plaintiff has sustained some nature of an asbestos injury? Or at least that's the policy?

A. That's the policy, yes.

Q. Okay. And is that generally because that is the law in most jurisdictions; unless a plaintiff has sustained an injury, he doesn't have a cause of action?

A. That has a lot to do with it. There's also insurance issues as well.

Q. All right. Well, let's set aside the insurance issues. Mr. Snyder, would it be fair to say that unless and until a plaintiff has sustained an asbestos-related injury, in virtually every jurisdiction in the United States they're not entitled to receive compensation?

A. Well, I think that you're probably getting into some fuzzy areas, and you're going to have to help me with the -- your meaning of the term "injury," because we've got some cases now that are starting to crop up in jurisdictions on medical morning that -- that may tend to blur that line. And certainly the issue of injury and what its definition means has been taken a lot farther in the insurance coverage context than it has in the underlying cases.

Q. Again, let's set aside insurance for the time being. In your mind, before Fibreboard is willing to pay any settlement value at all on a case, you have to be shown, do you not , that the plaintiff has sustained a present asbestos-related injury? Right?

A. That's a -- that's factor, yes.

Q. Well, in absence of an asbestos-related injury, can you think of other reasons why you would pay a claim?

A. I can think of circumstances where Fibreboard -- it hasn't done this, but I can think of circumstances where Fibreboard would go into a situation involving heavy exposure to its products and enter into low-values settlements across the board in order to get releases. Yeah, I think some defendants have done that.

Q. All right.

A. Fibreboard hasn't done it, but it's been done.

Q. Well, it's Fibreboard's policy, is it not, not to pay money on claims unless there is a present, extant asbestos-related injury?

A. That's pretty close to true.

Q. And isn't that also the fact -- well, strike that and let me ask it again.

Isn't it also true that in most jurisdictions in the United States, those claims, the ones without an asbestos-related injury, suffer dismissal for lack of a cause of action?

A. No, I don't think that's true.

Q. Hasn't Fibreboard been almost completely successful in having those claims dismissed when they're filed?

A. I think Fibreboard has, in a litigation context, a disagreement with the plaintiffs over what is an injury. And there are a lot of cases that are filed in Fibreboard -- and are maintained and that actually receive payment of money in the system that Fibreboard believes don't involve injuries that should be compensated.

Q. Well, that goes to the extent of the injury, does it not?

A. If you were talking to a jury, I think you argue that there's no injury.

Q. Mr. Snyder, have you ever had a case go to a jury where the plaintiff came in and said, "I'm sorry, I don't have an injury yet, I've merely been exposed to asbestos"?

A. I think there have been cases tried in the past based upon pure exposure.

Q. Do you know of any case that has been successfully tried where there has been no injury at all to the plaintiff other than being exposed to asbestos? Can you think of one?

A. I'm afraid that I have put some of the large cases that have been tried in some of the mass trials in that category.

Q. Where the plaintiff has come in and said, "I've no injury at all"?

A. No, the plaintiff hasn't said that. They've come in and said, "Pay me money; I have exposure." And we don't think they have an injury, but there is a verdict in their favor.

Q. Right. Those are contested cases?

A. Yeah.

Q. What about the case now, Mr. Snyder, now listen carefully, where the plaintiff comes in and says, "I have no present injury"? Are you aware of any such case that has gone to verdict and received a judgment where the plaintiff has said, "I have no present injury"?

A. I've never seen a plaintiff say that. I've

Testimony of Stephen Snyder, Fibreboard counsel Tr. 456-457

Q. Would it be fair to say that the primary purpose of this litigation is to enforce the agreement that you reached with plaintiffs' counsel on August 27th?

A. What do you mean by "this litigation"?

Q. The Ahearn case.

A. As distinguished from all of the other 80,000 cases Fibreboard is in --

Q. I'm asking you the purpose of the Ahearn case. Wasn't it just to enforce the terms of the private agreement that was reached between Fibreboard, Continental, Pacific and the plaintiffs?

A. A. It was not a private agreement. But putting that off to one side, the purpose of these pleadings. They, plead the facts of this settlement and seek to bring it to the court and to the rest of the interested parties for examination and approval.

Q. So the sole purpose of the case is to get approval of the agreement that you reached prior to the filing of the case?

MR. MILLER: Excuse me.

MR. BARON: Correct?

MR. MILLER: Your Honor, I'm going to be reluctant to object throughout, but I believe that's an argumentative question. Mr. Snyder gave his answers; Mr. Baron may not appreciate it or like it, but it was the answer.

THE COURT: I'll reluctantly overrule your objection.

MR. MILLER: Very well.

A. I believe that the event that caused the complaint to be filed at this time related to the agreement between the parties provisionally on what the terms of the settlement will be. But I hasten to add that if you read the August 27th transcript, you do not find in it anything close to the attention to the matters that are finally addressed in the final agreements. They had to be negotiated after that.

MR. BARON:

Q. Mr. Snyder, I would now like to go back and visit with you about some of the issues that you discussed in your direct examination, and particularly some of the history -- and I'll be very brief with this. I've placed in front of you a notebook that I have used previously. If you would look in the notebook, on the front cover there is a document that was previously attached to your deposition as Snyder exhibit No. 2. And for purposes of this record, we'll call it Objector's exhibit

Testimony of Stephen Snyder, Fibreboard counsel Tr. 466-468

us all their cases in their office, that's because we're asking for their cases. And so we got a lot of unfiled cases out of the Ness Motley affiliates in 1992 and "93, because of the terms of that settlement

Q. Okay. Well, did you give Ness Motley the option of taking those unfiled claims that were unfiled in August of 1993 and moving them into the global settlement as opposed to taking the terms of the Ness Motley agreement?

A. If we had done a presents deal, they would have gone into a -- as I understand it, they would have gone into the global.

Q. by the way, the class definition here is lawsuits -- I'm sorry. People who were exposed to asbestos that had not filed a lawsuit on or before August 27th and who had not settled their claims?

A. Or who had not.

Q. Or who had not settled their claims. Right?

A. That's part of it.

Q. Whose idea was the last piece of it? Or who had not settled their claims?

A. It was the agreement of the parties.

Q. Well, if there was a benefit to be gained by individuals for being in the Ahearn class, wouldn't you have expected that Ness Motley would have insisted that the class definition only be filed lawsuits, as it was in the Carlough case?

A. I don't -- I don't think you can make that statement. Because the Ness Motley deal itself is a present and futures deal. And the Ness Motley future clients are in the settlement.

Q. But the clients --

A. They could have argued, I suppose, that all their future clients be excepted from the settlement, but they didn't make that argument.

Q. Did they make the argument that all of their unfiled cases should be included in this settlement?

A. No. We made the demand that they include all their unfiled cases, because we did not want any cherry picking in the deal. And therefore, we insisted that they give us each and every case in their office. And we made it clear, and this is our language in the agreement, that it was material term of the agreement that we get each and every case and that none be held back. That was what we insisted on.

Q. You had a cutoff time for those cases, did you not?

A. [Pausing]

Q. In the Ness Motley August agreement?

A. There was a cutoff time. I think that was a moving target. But there was a cutoff time.

Q. Well, the agreement itself, and we're talking about the August 1993 agreement, required that Ness Motley have cases that were in its office brought to your attention by no later than August 17th of 1993. Correct?

A. You tell me that's true, I'll accept it.

Q. All right. What about cases that came to them on August 18th, August 19th and August 20th? Why didn't you want those?

A. Well, you've got to have a cutoff somewhere, Mr. Baron.

Q. I see.

A. That's the one we picked.

Q. All right. Mr. Snyder, back to exhibit No. 15, can you see trend from 1972 to 1993 in terms of increased case filings?

A. Can I see a trend between what years?

Q. Between the number of asbestos cases filed each year from the beginning of time 1972 through September 9th of 1993.

A. There was an increase in the number of cases filed against Fibreboard generally as there was an increase in the volume of the cases in litigation.

Testimony of Stephen Snyder, Fibreboard counsel Tr. 479-481

futures class mechanism.

MR. BARON: I do.

THE COURT: Under the trilateral agreement, the assumption is, under the tort system there will be a hundred percent payment of whatever their entitlement is to the various type claims?

MR. BARON: Yes. Until they run out of money.

THE COURT: So long as the money lasts, which is a cinch then to result in no money being available for either serious claims or minor claims after that point.

MR. BARON: Your Honor --

THE COURT: And I'm supposed to favor that over the other?

MR. BARON: There is a procedure available if it turns out that the company does not have adequate funds to pay everyone. And that procedure is called Chapter 11. And under Chapter 11 no one loses their job, the company continues to operate, no taxes are lost because it continues to make profits and pay the government. The company operates under Chapter 11 and each of the creditor constituencies, the small claims and the large claims, are at the table together. And a decision is made how it -- what is an equitable way to parcel out the available funds, as opposed to saying, "We'll give everything to the more significant cases and we'll hold back on the smaller cases. That's a statutory provision that's available.

THE COURT: I understand. So if it's under the -- and this is consistent with questions that I asked Mr. Snyder earlier. So if it's under the -- the structure of Chapter 11, then an apportionment scheme would be acceptable to you because that's the only option that would be available. Right?

MR. BARON: Well, Your Honor, I don't think -- that really begs the question here. The question is whether this settlement is fair. And the issue of whether it's fair is whether all of the constituencies were represented and got a fair shake at it . And in this particular circumstance, it's very clear and obvious that they did not.

THE COURT: I'm just trying to find out whether you favor bankruptcy over this proposed class action settlement.

MR. BARON: Your Honor, if I might, my favored option is the statement that was made under penalty of the securities regulations laws to the shareholders of Fibreboard and to their friends, I might add, that based on their projections they have

adequate funds to pay. That's my preference. However, if there is a shortfall, I think it's been mishandled under this trust because the right players weren't at the table.

THE COURT: If the trust were modified to where there was a percentage for all types of cases in the shortfall, would your objections then go away?

MR. BARON: All my objections? No.

THE COURT: I thought not.

MR. BARON That objection, perhaps

THE COURT: What objections would remain?

MR. BARON: Your Honor, we have filed objections, we're going to be getting into objections. I've got numerous objections to it, but this is certainly a very significant point.

THE COURT: So we wouldn't solve any immediate problems if that occurred, would we?

MR. BARON: Well, Your Honor, you know, it's a question of whether or not we're going to apply the rules of class actions to this particular case. And I think that the Second Circuit held in

Testimony of Stephen Snyder, Fibreboard counsel Tr. 510-511

opt-outs to occur without having at least two rights:

1. The right to recoup part of the purchase price that it had paid or

2. The right to, if the opt-outs were excessive, to jettison the whole deal.

And when we -- I don't think there was any principal disagreement with that. The problem was we couldn't come upon a method to value the opt-out claims either for purposes of determining whether there were an excessive number that would have the effect of making the deal unworkable or what the adjustment in the purchase price might be. And we could not resolve our differences on that; therefore, we had a term on which price was -- to

which price was sensitive that was not resolved, and that was more or less open-ended depending on what your sensitivity to risk was on that issue.

Q. Okay. In the letter on page 2, you state, "Fibreboard has made it clear from the beginning that it is only interested in an insured deal and intends to enter into a global settlement only if it can fund the settlement on that basis. If plaintiffs cannot accept this, then the parties are wasting their time." That was the position of Fibreboard?

A. That's what I wrote in the letter

Q. Was that the position of Fibreboard?

A. That was the position of Fibreboard?

Q. And that position remained the same all the way through August 27th, did it not, 1993?

A. No.

Q. When did it change?

A. At about 10 in the evening on the 26th

Q. When Fibreboard agreed to throw in an AIG policy that it had already captured?

A. No. That and some Fibreboard money, yes.

Q. All right. By the way, the total amount of Fibreboard money that is not insurance proceeds is how much in the Ahearn settlement?

A. It's about a half million dollars.

Q. Other than the 10:00 --

A. If you don't count the money that Fibreboard spent to get the insurance coverage in the first place, of course.

Q. Well, Fibreboard has been reimbursed by coverage for some of that, has it not?

A. For its coverage costs?

Q. Yes

A. I don't think so.

Q. Well, we'll get into that in a minute. But

Testimony of Stephen Snyder, Fibreboard counsel Tr. 519-521

Motley cases pretty much entirely and the only question was whether there were affiliate cases out there. And under normal circumstances, when we negotiate with the Ness Motley affiliates, we don't negotiate with Ness Motley affiliates, we don't negotiate with Ness Motley, we negotiate with their affiliates. So I don't know if we were negotiating with Ness Motley or not.

Q. Okay. Who is Michael Stanley, by the way?

A. Mike Stanley is a lawyer in my office that works on northern California cases.

Q. Turn, if you would, to tab 14.

A. He doesn't work on the global, by the way.

Q. Okay. Turn to tab 14, which is a letter dated April the 24th of 1992, to Mr. Kazan and his partner, Mr. McClaim, from Mr. Stanley of your office. You've seen that letter, have you not?

A. I've seen that letter

Q. In the letter, a settlement discussion or a discussion of settlement of certain cases of the Kazan from ensures where they're trying to settle cases with you out in the California area. Right?

A. Yes.

Q. And in the letter it says, "Fibreboard is willing to move quickly on these proposals" -- which were the proposals made by Mr. Kazan to settle those specific cases -- "especially if other special interest to Fibreboard could also be discussed, such as a resolution of future cases and your clients' participation in a global settlement."

A. I hope Mr. Stanley felt good when he wrote that, because he certainly didn't feel good after I read it.

[Laughter]

MR. BARON:

Q. You read it very recently when I showed it to you. Correct?

A. Yes. I didn't even know that that letter existed or that Mr. Stanley had taken global responsibilities upon himself.

Q. And if he did, he shouldn't have put it in writing, should he?

A. He shouldn't have done it. I don't make a distinction.

Q. Well, would it be fair to say that a reader such as Mr. Kazan or Mr. McClain might glean from what Mr. Stanley said that if they were willing to play ball with Fibreboard on the global that they would -- that their proposals for settlement of their present cases would be expedited?

A. I think Mr. Kazan will get a good laugh when he reads a letter like that.

Q. You don't believe that that's what it says?

A. I believe Mr. Stanley some day would like to do a great big global settlement. And I wish him the best of luck doing it when he gets to that point in his career.

Q. Okay. Mr. Snyder, if you would, turn to tab No. 15.

MR. INSELBUCH: So much for Stan.

MR. KOPLOW: He was a nice guy.

[Laughter]

A. What tab are we on?

MR. BARON:

Q. 15, it's a letter from Mr. Rice to you dated February the 8th of 1993.

A. Yes.

Q. You just testified a little earlier that the settlement demand that you had thought was one that were in the ballpark and you were about to agree on was 2.3 billion for presents and futures in 1991. Here we are now in 1993, and Mr. Rice has now said that, "Based on our review of all this data, we

Testimony of Dr. Lawrence Kradin, expert pathologist Tr. 553-554

substantial possibility that patients will progress to develop an asbestos-related malignancy or may progress to develop an ALD 1 type disorder from an ALD 2 background. If that were to be the case, my understanding would be that that compensation would probably be higher.

MR. RICE: Thank you, Doctor

THE COURT: Do you need to cross-examine this witness?

MR. BARON: Just a couple of questions, Your Honor. Be real quick.

CROSS-EXAMINATION BY MR. BARON

Q. Good afternoon, Dr. Kradin. I'm Fred Baron. I've got a few quick questions for you. Doctor, would it be fair to say that the majority of individuals who have been exposed to asbestos never develop an asbestos-related disease?

A. Yes, I think that's true.

Q. And also, Doctor, is it true that you cannot predict with any certainty which individual that's been exposed will indeed develop disease in the future?

A. That's correct.

Q. Doctor, if an individual were to present to you with exposure to asbestos but could not meet the criteria of any of the categories that are set out in this trust, would it be your conclusion that that individual does not presently have an asbestos-related injury?

A. That's a complicated question. I think from the point of view of a clinician, I would probably not be able to establish a diagnosis. From the point of view of a pathologist, I've seen too many cases now where there's been pathological evidence of disease. So I think the answer is that I would maintain an uncertain position as to that given patient.

Q. You wouldn't be able to say absolutely one way or the other?

A. No.

Q. Or you certainly wouldn't even be able to say probably one way or the other, would you?

A. No. But I certainly wouldn't dismiss that patient without concern.

Q. All right. Doctor, have you had the

Testimony of Stephen Snyder, Fibreboard counsel Tr. 588-605

A. I believe this was referring to three-sided negotiations that would occur now that Fibreboard and Continental had reached agreement.

Q. Okay. Well, let's drop down to the first--to the next paragraph here. It says: "I remind you that regardless of any arrangement you reach with CNA or any proposed discussions that might take place on a global settlement, we have a Ness Motley agreement that is the original primary focus of these negotiations." What negotiations?

A. We were sitting before Judge Higginbotham, the whole purpose of our being there initially, the cause, the initiating cause, was the dispute arising out of the Ness Motley agreement. There were no negotiations going on in the Ness Motley agreement, but there was a lawsuit. And unless we dealt with that, the lawsuit was not going to go away.

Q. Well, then was he mistaken by saying that the primary focus of these negotiations was the Ness Motley settlement?

A. I think that's in artfully stated probably.

There were no negotiations.

Q. So he was wrong?

A. Well, There subsequently were negotiations to convert the Ness Motley settlement into a three-party settlement. But that was something Fibreboard had promised to do in its April 9th

agreement. As far as Fibreboard was concerned, Ness Motley was settled.

Q. And were there negotiations going on at that time between Ness Motley and Continental?

A. Later on we got into negotiations about the renegotiation of Ness Motley on terms that Continental would be willing to accept to be added to the agreement.

Q. And those negotiations went on simultaneus with the global negotiations for a class action, did they not?

A. They took place over roughly the same period of time, but I think everybody that you talked to in deposition realizes that we made a run through the end of April trying to do something on the global, and then the plaintiffs walked out, and that in May, June, and the better part of July, we mainly focused on getting Ness Motley done. And when it was done in early August, then we obviously devoted all of our attention to the gloval. But there were periods of time in the May, June and July period where we were discussing the global as well, yes.

Q. Okay. When you say you wer discussing it as well, were they being discussed at the same meetings, in the same rooms, with the same parties present?

A. In the middle period, Mr. Inselbuch, Mr. Wartnick and Mr. Kazan were not present. Mr. Rice and Mr. Cox were taking the position that they could not negotiate the global, they were not authorized to do it. Mr. Wachtell and myself and I think to some degree Judge Higginbotham were taking the point of view that they had to talk to us about it, because it was an important subject and it needed to be dealt with. And so I think that you need to talk to each individual to decide -- to get an answer on that question. Mr. Wachtell and I, after April the 9th, basically always had in mind trying to come to closure on a global.

Q. Okay. So after April 9th, it was your belief that the only negotiations to be done were on a global?

A. No, that's not true. That was our primary interest. I mean, we were renegotiating three-party agreements with scores of law

firms. Ness Motley was only one of them. We were negotiating with you, we were negotiating with other people that we had done assignments with. This was simply doing the work of trying to get rid of the litigation that had been -- that had boiled over in the assignments. And the only way to do that is to get the parties to sit down at a table and decide on what terms we can get the insurers to come in and join the settlements. That was the focus of our attention in 1993 --

Q. Okay.

A. --everywhere in the country.

Q. Now, on April the 9th of 1993, you entered into a settlement -- into an agreement, I should say, with Continental Casualty Company, did you not?

A. 9th of April?

Q. Yes.

A. Yes. Fibreboard did.

Q. Yes. When I say "you," I mean Fibreboard. Under the April 9th agreement, Fibreboard entered into an agreement with Continental that would have prohibited Continental from entering into a global settlement with the plaintiffs without assuring that that global settlement would cover all of Fibreboard's liabilities to asbestos claimants forever. Correct?

A. I think that that agreement has a passage in it that does say that.

Q. Yes.

A. and we intended that we would be locked together in global negotiations, that Fibreboard
would not go off on its own and Continental would not go off on its own.

Q. Okay. By April 9th, then, or from April 9th, Fibreboard was bound not to go out and do deals with plaintiffs on their own without Continental's consent, and Continental was bound not to do a global unless that global let Fibreboard completely off the hook. Correct?

A. Unless it met the definitions of section 2 of the April 9th agreement, which means that tall cases would be included within Fibreboard's available insurance resources.

Q. In other words, off the hook?

A. That's your term, not mine.

Q. Well, would you agree with me, then, that it would have been impossible under that agreement for Continental to have settled their coverage in a way that would not have let -- would not have extinguished all of the asbestos liabilities of Fibreboard?

A. No, that's not true at all.

Q. What would have been the circumstances where that could have happened?

A. I believe we had negotiations with them in 1993 whereby if they had written a big enough check we would have done just that.

Q. Okay.

A. Just didn't work, that's all.

Q. Until August 27th, did it?

A. Well, we negotiated to try when we encountered so much difficulty with the plaintiffs, we discussed the possibility of a bilateral settlement and we weren't able to do it.

Q. But you were able to do it on August 27th?

A. Fibreboard, on August the 27th, in order to get a global, went along with Continental's demands. Otherwise, no way would we have entered into the settlement.

Q. Were you forced into it?

A. I don't want to use the term "forced," but it was an awful big carrot

Q. $2 billion is a pretty good size carrot.

A. No, that's not the carrot, Mr. Baron.

Q. What's the carrot, Mr. Snyder?

A. It was the global settlement agreement that we could not have, plaintiffs said, unless we also entered into a bilateral with Continental, and Continental said we couldn't have unless

we priced it on the identical terms as the global, which was not in a bilateral negotiating settlement acceptable to us.

Q. So the thing that forced you into the bilateral or trilateral, as it's called, was plaintiffs working out this arrangement for global?

A. Was the existence of the agreement in principle that was put on the record on the 27th, whereby we had a reasonable prospect of doing a global if the parties, Continental and Fibreboard, would agree on a trilateral. And that agreement was important enough to Fibreboard to make it give on some important points in the trilateral.

Q. Okay. Now let's turn to document No. 21. We're getting close to the end here. It's a letter dated May 12, 1993, and it's from Mr. Wachtell to Judge Higginbotham. Do you have that in front of you?

A. I do.

Q. Let's turn to page 14 of the letter. I'm sorry. Let's start -- let's get this in context. Let's turn to page 6 first. I apologize. Under the heading "Mandatory Class Action." It says: Continental is aware that plaintiff's perceive both legal and political problems with the structuring of the settlement as a mandatory non-opt-out class. Continental agrees that there are issues that must be addressed. What are the political problems? Do you know?

A. Oh, I think that the -- that plaintiffs made it very clear to us that in the abstract a mandatory class settlement would be very unpopular with the members of the plaintiffs' bar representing claimants, and that if we were going to do that it had better be a deal -- there had better be some justifications for it.

Q. Turn to page 15, if you would. On page 15, Mr. Wachtell sets out potential justifications. I'd like to go over the one that's numbered No. 6. It says: "Any political problems can be ameliorated to the extent the plaintiffs' representatives could be deemed to be acceding to a mandatory class structure at the strong urging of the judiciary." Do you know what that referred to?

A. It says what it says.

Q. Was that discussed at any of these meetings?

A. I don't think there was any secret about the fact that Continental hoped to get judges to agree with them with regard to the things they put in these letters. That doesn't surprise me at all.

Q. So that they were hoping that these judges would make it clear to the plaintiffs that they would be acceding to a mandatory class structure at the strong urging of the judiciary?

A. I think that was Continental's position. And I have a grave concern about whether that works in the asbestos litigation. I think sometimes it's very counterproductive when that happens, given the independent-mindedness of the plaintiffs' lawyers in this litigation.

Q. Mr. Snyder, did you receive a copy of the document that is tab No. 24, which is Mr. Rice and Mr. Cox's letter to Judge Higginbotham dated May 27, 1993?

A. I think I did.

Q. In reading that document, did it make it very clear to you that the plaintiffs were very strongly against the use of a 23(b)(1)(B) class to resolve this problem?

A. Yes. I believed at that time that it would be very difficult to persuade them otherwise.

Q. And did you understand why they were so opposed to the use of a (b)(1)(B) mandatory non-opt-out class?

A. I only have the reasons that they gave.

Q. And you took those reasons at face value?

[Laughter]

A. Of course I took the reason at face value in a negotiating environment. And I also took into account the fact that these people were accustomed to getting their way a lot of the time.

MR. BARON:

Q. And that the way they wanted to go was an opt-out class, if they were going to do a class?

A. That's exactly what they said in this letter at this time. They also said they weren't even there to negotiate at all. And I

took that for face value -- at face value for what it was worth, although I've already said yesterday that I thought that that in and of itself was negotiation.

Q. Bear with me for a moment here. I lost something.

Mr. Snyder, I asked Mr. Kazan, in his deposition, when he changed his mind about the 21(b)(1)(B) non-opt-out class --

A. 23.

Q. I'm sorry. 23(b)(1)(B) non-opt-out class, and he said, "I began to explore the (b)(1)(B) potential after CNA came to the table and brought its checkbook."

MR. BSCHORR: Excuse me. What page?

MR. BARON: Page 29 of his deposition, in tab No. 6.

Q. And I asked him: "Why was that Mr. Kazan?"

And he said: "Because CNA made it crystal clear that the only basis upon which they would pay money was on a limited fund (b)(1)(B) non-opt-out class."

Is that indeed what happened, that the only reason in your mind that the plaintiffs turned tail and changed from an opt-out class, that they wanted, to a non-opt-out (b)(1)(B) is because Continental said, "We won't pay you unless you do this"?

A. That's part of the reason. I think everybody believed, by the time all was said and done, the CNA wouldn't pay anything unless there was a mandatory structure. And I think everybody also believed that CNA, even under those circumstances, wouldn't pay anything more, and that we had -- we, the plaintiffs, had accomplished in getting everything out of CNA that it would pay. I think all those things are true.

Q. How could CNA have settled with the plaintiffs on a (b)(3) opt-out class, under the terms of your April 9th agreement?

A. [Pausing]

Q. Could it have been done?

A. Of course it could.

Q. They would have just had to continue paying forever and ever and ever. Right?

A. They would have had to continue to pay the opt-outs, whatever they were.

Q. So everybody could opt out, use the tort system, and it would be as if they had no settlement at all?

A. It would be as if they had assumed responsibility for the cases.

Q. Right. Which would be a total loss on their part?

A. I don't know what it would be. It would be something that they had already made perfectly clear they weren't willing to do.,

Q. All right. So they weren't willing to just step up to the plate and say, "We will insure Fibreboard forever and ever and ever." and the only thing that they would accomplish short of the under the April 9th agreement that they had with you would have been a (b)(1)(B) non-opt-out class or a separate settlement with you?

A. I think that that's a very limited view of the options that were available.

Q. What other options were there?

A. Well, there were -- I mean, I had worked -- tried to work with the plaintiffs on different levels of risk-sharing an opt-outs in the -- in the opt-out setting. I can't say that we had great success, but I mean there are gradations between falling through a trapdoor and just paying a certain amount of money with a check. And there's also the right in connection with a lot of (b)(3) classes to simply walk away from the deal if the opt-outs seem to be excessive. The problem with all of that is that it doesn't work for anybody. It just doesn't work -- not only does it not work for Continental and Fibreboard, it doesn't work for the plaintiffs, because the people who are doing the opting out at that time don't know what they're opting out at that time don't know what they're opting out, because they don't know, in many cases, what their disease is. All they know is that they have a potential for a disease.

Now, the other problem for Continental Mr. Wachtell referred to in his opening statement was the one-way option. And that was something I don't think we could sell.

Q. So the choices were narrow?

A. The -- we -- I believe that when all is said and done, to get the three parties together, this is the deal that we had to do in order to make that happen, and that given the variety of positions, very distinct position from Pacific, very distinct for Fibreboard, distinct from Continental, the West Coast lawyers on the plaintiffs' negotiating side didn't always have the same view as the East Coast lawyers, the people inside the Ness Motley firm didn't always have the same view, given the complexity of the negotiation, I believe we did the only deal we could do.

Q. All right. Let's talk about that. Flip to tab 27, if you would. It's a letter dated July the 9th, 1993, that was written from your partner, Mr. Irwin, to Mr. Wachtell regarding global settlement and bilateral settlement. Got that one?

A. I see the letter.

Q. Turn to page 3 of the letter, if you would, second paragraph. "In meetings over the last two weeks, Continental has indicated its willingness to pay $2 billion for a global settlement or a bilateral settlement with Fibreboard, in addition to $600 million for existing settlements."

So by July, they had $2.6 billion on the table for purposes of a bilateral. Right?

A. Are you meaning by that to the bilateral that we have here? Because these are not comparable figures.

Q. Oh, the number you have here is higher, no question.

A. No, it's much lower.

Q. It's much lower? The bilateral you have here, or the trilateral you have here --

A. Continental ends up paying, in my judgment, about 3.3, 3.4 billion dollars as a result of this overall arrangement. This would constitute a payment of no more than 2.6 billion. It was

not acceptable to Fibreboard in the bilateral context, and the plaintiffs weren't agreeing to it in the global context.

Q. I understand that. But the point is that by the first week of July, there was $2.6 billion on the table in the context of a non-class action settlement. Correct?

A. [Pausing]

Q. I understanding it wasn't acceptable.

A. Do you mean a bilateral with Fibreboard?

Q. Yes. Continental settling their coverage with Fibreboard. Continental offered to settle it for $2.6 billion. Fibreboard turned it down. But Continental was willing to pay that without the necessity of a class action. Right?

A. That's not true at all.

Q. Well, how am I missing something here? It says in meetings over the last two weeks Continental has indicated its willingness to pay $2 billion for a global settlement or a bilateral agreement with Fibreboard, in addition to the $600 million for existing settlements.

A. You read that correctly.

Q. Were they offering $2.6 billion in the context of a bilateral settlement with Fibreboard?

A. At that time, they were, but that also included a requirement for a class action.

Q. Why would the words say for a global settlement or a bilateral agreement?

A. Because even in the bilateral context they wanted a class action, and they still do, and they still have one. It's called Rudd.

Q. Rudd, right. But it wouldn't have been a class action that would bind plaintiffs, litigants, in the sense --

A. I beg your pardon.

[Laughter]

MR. BARON:

Q. In the sense that they would be required to only seek funds against a trust. They could have gone after Fibreboard under the context of that settlemetn, could they not?

A. I believe that that's what we comtemplated when we talked about a bilateral, yes.

Q. And that's why you didn't agree to it, because you didn't want Fibreboard exposed?

A. I didn't agree to it because it was not enough money.

Q. And because Fibreboard would be left exposed at the end of the road. Right?

A. Well, that's one of the ways you determine how much money you need.

[Laughter]

MR. BARON:

Q. Now, this particular settlement, Ahearn, is worth $3.35 billion, thereabouts?

A. I believe that that is a rough estimate of what comes out of this, yes.

Q. All right. On July the 9th, 1993, Continental had offered $2.6 billion. What was your demand in terms of a bilateral then, without the necessity for doing a (b)(1)(B) non-opt-out mandatory class for plaintiffs?

A. I think it was -- I think it ws the five or six hundred million dollars apart from this.

Q. Sounds like they should have taken it.

A. Asbestos is a funny litigation, isn't it?

[Laughter]

MR. BARON:

Q. So you would have been willing to enter into a bilateral settlement with Continental in July for a little over $3 billion, a little over a hundred or two million over $3 billion?

A. 3.2 or something like that.

Q. And if you had been able to obtain tha settlement, you would not have required the plaintiffs' bar to enter into the mandatory non-opt-out settlement. Correct?

A. That depended whether they wanted to do a settlement with Fibreboard or not.

Q. Sure. You wouldn't have required it, but if they had wanted to get their percentage, they sure could have done it, couldn't they?

A. What is that supposed to mean? I don't understand that question.

Q. All right. I'll pass on, if you don't understand that one. Now turn with me to the document that

Testimony of Stephen Snyder, Fibreboard counsel Tr. 610-611

Q. When was it done?

A. It was done in Dallas. And it was reported about a week before it was --

Q. You're absolutely right.

A. -- approved.

Q. Under the terms of the Ness Motley settlement, Ness Motley settled what, about 45,000 cases or so for themselves and their affiliates?

A. There were about 45,000 cases, when all was said and done, in the Ness Motley renegotiated three-party agreement.

Q. And the renegotiated Nes Motley three-party agreement called for a payment of 50 cents on the dollar for the claims, and the other 50 cents on the dollar to be paid when?

A. On the occurrence either of a coverage on Fibreboard prevailing in its coverage cases, on the negotiation of a resolution of the coverage cases or upon the occurrence of a global as that was defined in the agreement.

Q. Well, in terms of the resolution of the coverage cases by the courts, that was somewhere up in California, intermediate appellate court?

A. It could have been done by settlement.

Q. That was the second way to do it, by settlement?

A. Yes.
Q. And the third way to have done it would have been by entering into a global settlement?
A. Yes. But when you say it was in the appellate courts, it was in the appellate courts with the possibility of a decision this year. There was always the possibility also of time in the Supreme Court.
Q. Still hasn't been decided today, has it, 1994, a year later?
A. In the appellate court, it has been.
Q. But not in the Supreme Court. Hasn't even been set for argument yet, has it?
A. The Supreme Court has -- the coverage case?
Q. Yeah.
A. I believe that the coverage case is being held in the appellate court, at least part of it, until the appellate court learns whether we've been successful in settling our differences here.
Q. Mr. Snyder, what was the value of the Ness Motley agreement that was entered into in August of '93?
A. Well, if you -- if you don't count the zero-pays that will work their way into the system as

Testimony of Stephen Snyder, Fibreboard counsel Tr. 616-618

again, of Pacific Indemnity, was that only Ness Motley has reached resolution of the present cases or has a written agreement in place that would provide guidelines or resolutions. And at the top of the next page it says: Judge Higginbotham was making it clear to us that Pacific Indemnity might attack the negotiations as being improper because of the existence of attorneys negotiating their presents and their futures?
A. No, I don't. I've got to make it clear that Fibreboard had a contract with Pacific Indemnity, the second Pacific settlement that basically kept Fibreboard out of the discussions as they

related to whatever pressure was being brought to bear on Pacific. And I note from the date that it was bout this time that it was happening, to bring them into the negotiations.
Q. Turn to tab 32, if you would. This is a memo dated August 20, 1993, that came from Mr. Sweeney's file and was identified by him in his deposition. He says his memo of August 20, 1993, when -- after he had been appointed to be a negotiator of the global settlement by Judge Parker -- that he received a call from Peter Coleman, who is in charge of settlements for Fibreboard. Who is Peter Coleman?
A. He's a lawyer with Fibreboard.
Q. Okay. In his memorandum, he states, "He, talking about Mr. Coleman, indicated that Fibreboard is most anxious to resolve the inventories of our office, Steve Kazan's office, and Harry Wartnick's office." Did you talk to Mr. Coleman about getting all of the cases, the inventories of class counsel settled before the deal was done?
MR. MILLER: Excuse me, Your Honor. By its terms, that particular question as phrased violates the attorney-client privilege. We object.
THE COURT: Do you want to rephrase, counsel? I don't recall all of it.
MR. BARON: All right.
Q. Mr. Snyder, was it Fibreboard's intention to try to get closure on Mr. Sweeney's cases., Mr. Kazan's cases, Mr. Wartnick's cases before they came to closure on the global settlement, specifically during the week of August 20th?
A. I seem to recall that at one point -- I don't know when -- this was about the time Professor Green got involved or not, or whether it was after that, it was discussed that he class counsel should make an effort to settle up whatever cases they had remaining or to complete settlements before any global was completed. I think that the fact of the matter is that that is -- on reflection, we all realized that that --under normal circumstances

and some other litigation might be a desirable goal, but it was an unworkable goal in the asbestos litigation.

Q. And why was that?

A. Because cases are coming through the system all the time. There are lots of cases, I think, that the Ness Motley people had some responsibility for in the present inventory that we just didn't join the Ness Motley deal. And not only did we not settle their cases, but we didn't negotiate to settle their cases, but we didn't negotiate to settle their cases. And they had affiliate relationships with law firms that probably required them to come in and try a case if the case went to trial. They didn't have responsibility for settling cases, as I understood it. There was no way that we could do something like this. We were either going to settle those cases or we weren't. And so we have to understand that even

Testimony of Stephen Snyder, Fibreboard counsel Tr. 621-623

A. It applies the Nicholson curve out of his article without analysis of the Fibreboard cases. And it takes the CEC data for what it is.

Q. All right. And under -- using that data and only going out to the year 2017, it projects 27,3332 future fillings, does it not?

A. If you extrapolate from one year, that's the kind of result you get.

Q. All right. Now, Mr. Snyder, you have previously testified that you believe that it is more likely than not that if the global settlement is ultimately disapproved, that Fibreboard will have adequate funds under the trilateral settlement agreement. Correct?

Mr. MILLER: I object to that.

THE COURT: The court heard the testimony. The court will recall it.

A. What was your question?

MR. BARON:

Q. Is it more likely than not, in your opinion, that if the global is disapproved that Fibreboard will continue to operate indefinitely and pay its liabilities pursuant to the trilateral settlement?

A. If Fibreboard doesn't get the global, if the global is not approved and the trilateral is, I think

that Fibreboard probably can use those funds to stay viable, but that in order to do so it will have to achieve settlement values of less than half of what it's paying now under the assignment system, and it would have to spend a very substantial amount of that money, perhaps even more than half of it, on defense costs. That was the burden of the charts that I have in my materials under tab 1.

Q. Yes, I've reviewed your charts.

A. And I also -- by the way, in the deposition passage that you quoted, you didn't quote the material where I said I thought there was a grave risk that Fibreboard wouldn't be able to do that. And I think that should be clarified as well.

Q. Well, in the deposition, the question was asked of you by Mr. Golan: Does that mean you think it is more likely than not that if that were to occur, that being global disapproval, Fibreboard could defend, and to the extent necessary pay the future claims within the roughly $2 billion provided under the trilateral?

Answer: Yes, that's what that means.

That still is your testimony today, is it not, sir?

A. In the context of everything else I said in the deposition, yes.

Q. Okay. Does Fibreboard have any present plans to go into bankruptcy, to you knowledge?

A. Not to my knowledge.

Q. If the global is disapproved and the trilateral is approved, do you foresee a Chapter 11 filing for Fibreboard?

A. That's beyond the scope of my responsibilities for Fibreboard.

Q. What tax benefits, if any, will accrue to Fibreboard if the global settlement is approved?

A. [Pausing]
Q. Do you know?
A. I'm not aware of any tax benefits that will accrue to them.
Q. Are there still other insurance coverages that might be available to -- strike that.

Has Fibreboard resolved any insurance -- any other liability insurance policies for purposes that would be asbestos-related policies -- boy, it's getting late in the day. I'll start over.

Mr. Snyder, does Fibreboard have any funds available to it from the liquidation of other insurance policies that were intended to cover

Testimony of Harry Wartnick, class counsel Tr. 643-646

Q. And is your memory of those events consistent with Mr. Snyder's testimony?
A. Yes. I was viewing it from the opposite side, but, yes, it is consistent.
Q. I would like to call your attention then to the -- may I withdraw that, Your Honor?

You also have heard testimony from Mr. Snyder, have you not, on the subject of Fibreboard's litigation with its carriers?
A. Yes, I did.
Q. Did you follow that litigation
A. Yes, I did.
Q. And were you aware of the status of that litigation as we approached the year 1991?
A. I've been generally aware of it since the mid-1980s. I actually attempted to intervene a plaintiff into the litigation back in 1983-1984, sometime in the general time period, and I have followed it generally ever since.
Q. How did you follow it, sir?

A. I was in San Francisco, I paid attention to what was going on at the courthouse. When the various tentative decisions came done from Judge Brown, I obtained copies of it. We obtained copies of the judgement. And when the case went up on appeal, we obtained copies of the various briefs and generally made an effort to keep abreast of what was occurring.
Q. Let me call you attention to the beginning of the year 1991 and ask you if you can briefly describe for the court how, as you observed them and lived them, the negotiations that became ultimately the Ahearn settlement began.
A. My first involvement that I can recall is receiving a telephone call from Mr. Snyder, either in very late 1990 or early 1991, suggesting that the type of settlement negotiations that we had been engaged in the San Francisco Superior Court could perhaps provide a model or a method by which cases could be settled on a larger scale nationwide. And he wanted generally to know if that is a subject that I felt was worth exploring. I indicated to him that I thought if probably was.
Q. And briefly describe for the court what steps were taken from your side of the table thereafter.
A. Mr. Kazan, who I think also received a similar call, and I met with Mr. Snyder and Mr. Levin, I believe it was a Saturday morning, at the Hyatt Regency in Hyatt Regency in Oakland, sometime in mid-January. We then discussed the matter among ourselves and shortly thereafter contacted Ron Motley, after we had come to the conclusion that if something such as this was going to be done, certainly Ron and his firm would have to be involved if it were to be successful. We met with Ron. I think our first meeting in person was in San Francisco. And between us, we agreed that this certainly was a subject that should be considered further.
Q. Stopping there, Mr. Wartnick, what was the consensus of the group based upon? Why did you think it was a subject that should be considered further?

A. My biggest concern, I think all of our concern from the outset was the conditional nature of Fibreboard's insurance coverage. They didn't have any at that point that was in place, or effectively didn't have any in place other than the little bit they had from the interim agreement with CNA. And we knew that they had one what could be tremendous amount of insurance coverage from the trial in Judge Brown's courtroom. But that was not in place at that point and was subject to appellate review, both at the court of appeal level and the Supreme Court level in California. And that indeed if Fibreboard did not succeed in having affirmed the basic judgment that they have, we did not feel that Fibreboard had adequate resources to remain a viable entity.

Q. What was the proposition that you and your colleagues intended to pursue?

A. We intended to pursue a settlement with Fibreboard on an assigned -- initially on an assignment basis, and then as we started looking at it more carefully, it was clear that for the pre-1959 -- for the post-1949 cases an assignment was not an appropriate way to go, and that eventually became a straight negotiation with them.

Q. Once you decided to go forward, describe briefly for the court what were the next steps taken.

A. We very early on decided that having dealt with the Brobeck firm in the past that while I certainly felt very comfortable in litigation or negotiations with them in a personal injury context, that this type of negotiation and proceeding would involve far more than that in terms of commercial litigation, insurance class action and tax issues, amongst others, and that I felt I did not have personally the expertise to adequately represent the interests I would be representing in that type of negotiation with Brobeck. And we agreed that we wanted to retain counsel and we contacted you at Caplin & Drysdale and we eventually retained you.

Testimony of Harry Wartnick, class counsel Tr. 649

proven to be -- to come the closest to what the actual experience had been

Q. Mr. Baron and others have made a great deal of the fact that at this stage in negotiations it was contemplated that any settlement would be on an opt-out-Rule 23(b)(3) basis. You've heard all of that testimony?

A. Yes, sir.

Q. Is it correct that at this time that's what was comtemplated?

A. Yes, sir.

Q. Why was that?

A. Couple of reasons. First of all, given a choice, I would rather give a member of the class the ability to opt out, in lieu of presenting it, if that could be done. I think that's probably preferable to the victim, if it's available.

Second, legally, I felt, and I think the group felt that it would be easier to support an opt-out class in light of the jurisprudence then available.

Q. And did the group then proceed to negotiate with Fibreboard on the basis of potential class action settlement?

A. Yes, we did.

Testimony of Harry Wartnick, class counsel Tr. 685-688

Q. Okay. You can't testify one way or the other on that, can you?

A. No, sir.

Q. All right. Mr. Wartnick, you never intended to file a class action lawsuit in a case such as this without an agreement in place, did you?

A. No, sir.

Q. All right. Mr. Wartnick, you never intended to file a class action lawsuit in a case such as this without an agreement in place, did you?

A. I wouldn't. I certainly had no intention to file a contested or a litigated class action lawsuit against Fibreboard during this process, that is correct.

Q. Okay. In other words, but for an agreement with Fibreboard, you would not have participated in a class action litigation against them; is that right?

A. I had no intention to file a litigated class action against them throughout this process, that is correct.

Q. All right. Now, in the event, however likely, that the global is disapproved by either this court or by another court, do you contemplate that this case will be dismissed?

A. I believe that applications will be made to the court to dismiss this action by Fibreboard and others. Whether it's actually dismissed is up to the court.

Q. Will you contest those motions to dismiss?

THE COURT: What does that have to do with any decision this court has to make?

MR. BARON: Mr. Wartnick knows. Your Honor, it goes to Article III, Section 2 of the Constitution, the power of this court at all to prosecute this case, if indeed this is a case.

THE COURT: The court has some passing familiarity with Article III. I see no relevance whatsoever to that line of questioning. Go ahead.

MR. BARON:

Q. Mr. Wartnick, if the global fails and Fibreboard moves to dismiss the case, will you oppose it?

A. That depends on the circumstances at the time.

Q. What circumstance might be there that would require you to oppose it? Can you think of any?

A. Fibreboard or the insurers act in bad faith, I will certainly oppose it. If such a motion is made, I will consult with

counsel and with the other class counsel and will make an appropriate determination at the time.

Q. Mr. Wartnick, you and your firm have represented asbestos victims for what, 15 year or so?

A. Approximately.

Q. And during that 15-year period, have you had clients come to your office complaining that they were exposed to asbestos-related disease?

A. Yes.

Q. And, Mr. Wartnick, is it your practice to file lawsuits for clients who were exposed but have no asbestos-related disease?

A. Usually not.

Q. And, Mr. Wartnick, in the open market of asbestos litigation, do you believe that a case involving an individual who has been exposed to asbestos disease but who has no present injury of any kind of character is worth $50,000 in settlement?

A. I have no way to answer that. There are certainly medical monitoring decisions --

Q. Let's exclude medical monitoring.

A. In California, I'm not sure that I can, in answering that.

Q. Okay. Well, I'll ask you the question in a jurisdiction that does not have medical monitoring. Is a claim that an individual has been exposed to asbestos but has no present disease at all of any kind or character a case that in good faith is worth $50,000 for settlement purposes?

A. I would not expect to receive $50,000 in settlement today on such a claim.

Q. all right. Mr. Wartnick, how many medical monitoring class have you filed for asbestos people who have been exposed to asbestos?

A. Personally, I have filed none.

Q. Thank you.

Have you yourself done any research on whether or not the trilateral is adequate or inadequate to pay all the remaining claims against Fibreboard?

A. I don't know what you mean by research. I've certainly given it some thought, and I've looked at some of the materials that have been produced through the litigation.

Q. Do you have information as to the cost of defense of similar defendants such as Fibreboard or like Fibreboard, such as Pittsburgh Corning, what they spend each year?

A. I can't answer as to Pittsburgh Corning. I'm certainly familiar with what Manville spent during 1990.

Q. How much was that?

A. For what, from the first of the year through July or August, whenever Judge Weinstein sustained

Testimony of Harry Wartnick, class counsel Tr. 691-693

reaching this settlement were that there would be approximately 175,000 to 185,000 claims in the future; is that correct?

A. I think the number I used was about 186,000

Q. Okay. So the settlement that you reached in Ahearn was based on your assumption that there would be 186,000 claims or so in the future?

A. Yes, sir.

Q. Okay. And if it turns out there's less, you've made a particularly good deal, in your mind; and if it turns out there's substantially more, it might not be such a good deal. Correct?

A. No, I don't agree with that at all. Given the option of the reversal of the insurance coverage case and Fibreboard having nothing more than its net work available to asbestos victims, I do not agree with that at all.

Q. Did you hear Mr. Snyder testify that he thought that the trilateral settlement was good enough that if the global fails he

would have preferred that to a litigated result and a litigated win in the insurance coverage case?

A. Yes.

Q. And do you agree with him?

A. I am not -- if you're asking me to compare the trilateral with a full win for Fibreboard --

Q. Yes.

A. -- in the insurance coverage case?

Q. Yes.

A. I'm actually not sure which way I would come down on that. I have not given that issue a lot of thought.

Q. If you represented pre- 1959 clients, they would be better off with a full win in the insurance coverage case. If you represent post- 1959 clients, they're better off with the trilateral. Correct?

A. Under what assumption?

Q. Under either assumption. Under the assumption that there's fair resolution. Did you understand my question?

A. No, I didn't.

Q. Let me try it again. Mr. Wartnick, if your clients tomorrow were all pre-'59 cases, they would be best served if Fibreboard won the coverage litigation. Correct?

A. Compared to what?

Q. Compared to the status of post-'59 cases.

MR. INSELBUCH: Object to the for.

THE COURT: Overruled.

A. Is that assuming that there is a Fibreboard win in the insurance coverage case?

MR. BARON: Yes.

Q. Assuming a Fibreboard win in the coverage case, that would most significantly benefit your pre-'59 clients?

A. Assuming the Fibreboard has access to the $360 million in the settlement?

Q. Yes.

A. Then I don't think it makes a whole lot of difference whether they're post or pre-59. I think for $350 million to use for post-1959 claims, Fibreboard would probably be okay.
Q. Okay. So you think that $360 million will cover all of the post-1959 exposure cases a hundred cents on the dollar, just like the other pre-'59 cases would be covered. Correct?
A. I believe that there's a reasonable chance for that, yes. I have not given that issue a lot of thought, however.
Q. Have you given a lot of thought to the value of the pre-'59 future case --
A. To the extent those calculations have been done, I don't have them in front of me or in my mind at this point. I believe that other people will be

Testimony of Harry Wartnick, class counsel Tr. 700

based upon your access to Fibreboard's in-house estimates and expert estimates, you settled on the 186?

THE WITNESS: Yes, sir.

PROFESSOR GREEN: Thank you, Your Honor. One further question.

Q. Do you -- actually, it's two questions. Do you anticipate representing members of the class before the trust if the global settlement is ultimately approved and implemented?

A. Yes. And I'm already doing so with respect to interim claims.

Q. Can you state what your expectation is with regard to the net values received by those claimants as compared to the historical values that your clients have received from Fibreboard in the past?

A. I think that my clients will probably do equally -- in terms of net after cost and after attorney's fees?

Q. Yes, sir.

A. I think they'll probably do better. The attorneys' fees are limited to 25 percent. And the cost of prosecuting the case against the trust will be minimal.

Q. Do you expect to demand from the trust higher

Testimony of Harry Wartnick, class counsel Tr. 703

necessity to undergo medical surveillance in order to detect the onset of any future asbestos-related conditions." Then it says, "As a proximate result of these injuries, plaintiffs, their decedents and those similarly situated to them or some of them have suffered further losses and injuries, such as lost wages, past and future medical expenses, funeral and burial expenses, loss of support, loss of consortium, pain and suffering, emotional distress, loss of life's pleasures and loss of society." Were those allegations made in good faith?

A. Yes, sir.

Q. And does this complaint include a prayer for punitive damages?

A. I actually haven't reviewed it. Could you lead me on that, sir?

[Laughter]

MR. WACHTELL:

Q. Let me read the prayer for relief. "Wherefore plaintiffs pray," and I'm going down to B, "punitive damages from Fibreboard in an amount to be determined."

A. Yes, we did.

Q. Is that a good-faith claim?

A. Yes, sir.

Testimony of Harry Wartnick, class counsel Tr. 706-08

Q. Do you think it's in the best interest of your clients, being their attorney, for the court to approve the trilateral agreement that's set forth in the Rudd class?

A. Yes, sir, very much.

Q. You say that despite the fact that you would prefer to have the global agreement, is that correct?

A. Yes, sir. The alternative is the insurance dispute that's pending before the California Supreme Court right now. And the ramifications that I have discussed earlier, as I know Justice Kaufman has discussed in his declaration of a loss to Fibreboard of even a part of that insurance coverage effectively, in my opinion, renders Fibreboard a candidate for bankruptcy. And my clients and the members of the Rudd are candidates for minimal amount of payments, given the amount of money that Fibreboard already owes.

Q. Do you happen to have my clients who have been exposed to asbestos but have not shown any injury?

A. I've had people who have consulted me under those circumstances. And given the fairly liberal statute of limitations that we have in California, I have simply suggested to those people that they call us again if they are diagnosed with the disease.

Q. And if they call you again, say, 15 or 20 years from now, how do you feel about their chance of being awarded any sum for their injury under the terms of the trilateral agreement?

A. I think probably over a 15- or 20-year period they'll probably be okay.

Q. All right, sir. Mr. Snyder said that members of the team, negotiating team, insisted upon the trilateral agreement. Where you one of those?

A. Absolutely.

Q. And why did you do that?

A. I was very concerned at that time that any settlement or any deal that we made with Fibreboard and the insurers, if CNA

or Pacific Indemnity won at the appellate court level, that given the amounts of money involved here, they would do everything in their power to prevent this proceeding from going forward. We're talking -- I do not mean anything adverse to Mr. Wachtell or Mr. Koplow or anybody at his firm, but with a billion-and-a-half dollars at stake, I was very concerned at that point that CNA and/or Pacific would have an incentive to not pursue this as aggressively as it should be pursued to conclusion. And I felt it was essential at that time to get backup protection for the members of the class. And that took the form of the trilateral agreement.

Q. And you're satisfied that this is a good backup to that?

A. Yes., sir, I am.

MR. COLEMAN: Thank you.

THE COURT: Mr. Wartnick, the testimony the court's heard concerning the amount of the assigned settlements that are out there of 1.3 billion, or whatever it was, do those settlements typically have recourse against Fibreboard in the event, for example, they lost the coverage case?

THE WITNESS: I believe that they do, although I -- I have none of those. I represent no clients who have assignments with Fibreboard, so I may not be the right one to ask those questions to.

THE COURT: My question I assume someone will address then is in the event the coverage case is lost, Fibreboard is looking at a hickey of 1.3 to start with?

[Laughter]

THE WITNESS: I would hope that most -- I would hope, Your Honor, that the plaintiffs' lawyers who negotiated those assignments did obtain Fibreboard's backing behind them. I don't know that

Testimony of George Priest, insurance law expert Tr. 766-772

THE COURT: Who is your next witness, counsel?

MR. ROSENTHAL: My name is Benjamin Rosenberg representing Continental. We call Professor Priest as our next witness.

THE COURT: I would hope we're at a point now, gentlemen, where we can step the pace up a bit. As far as chronology of the negotiating process is concerned, I think that the remaining witnesses can focus on any differences of recollection they might have with Mr. Snyder's testimony, and Mr. Wartnick's. I'm, of course, interested in fully developing the ethical questions and the notice questions.

Professor, do you swear the testimony you will give in this case will be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: I do.

THE COURT: Take your seat.

Counsel, I'm very familiar with your witness. I don't need to hear his qualifications. If you wish to file his CV for the record, that would be fine.

MR. ROSENTHAL: Thank you, Your Honor. At this time it's Continental exhibit 6. I move its admission.

THE COURT: Admitted.

DIRECT EXAMINATION MR. ROSENTHAL

Q. Professor, in your resume, can you describe very briefly what your focus has been, both in writing and teaching?

A. My focus has been the study of the tort system and its relationship to the court system and particularly trends in the law over the last 50 or 60 years, including the development of the law in recent years.

THE COURT: While I said I was completely familiar with him, I didn't mean to say I had always agreed with him.

[Laughter]

MR. ROSENTHAL: I understand.

THE COURT: Go ahead.

MR. ROSENTHAL;

Q. And, Professor, is it correct that you have testified as an expert in both tort and insurance matters before other bodies, including courts?

A. Yes, sir.

Q. Have you ever testified as an expert about California insurance matters?

A. Yes, sir, I have.

Q. And is it correct that you have testified before the California Department of Insurance on three occasions?

A. Yes, sir.

Q. And also before the Insurance Commissioner in consolidated hearings on at least one occasion?

A. Yes, Sir.

Q. And also before a select committee of California legislature, also in California insurance matters?

A. Yes, Sir.

Q. And have you testified in other fora on insurance matters also?

A. Yes, in various states and also before Federal Congressional committees.

Q. Do you have any experience in class actions, Professor?

A. Yes, sir, I do.

Q. Can you please describe that, very briefly?

A. Yes. I've served for the past years as a special master in a large ERISA litigation in the district of New Jersey, I was appointed by Judge H. Lee Sarokin.

Q. Is that McClendon v. Continental Can?

A. Yes, it is.

Q. Through your teaching and work, have you studied the comprehensive general liability insurance policies?

A. Yes, sir, I have.

Q. Can you describe briefly what your study of those has entailed?

A. Well, anyone that writes in the torts of insurance area has to, especially when you're dealing with property-casualty insurance and business risks, has to deal with the comprehensive general liability policy. But I teach insurance, too, at Yale Law School; and my classes have been devoted in part to studying that policy and its development over time.

Q. In your classes, have you studied the California Supreme Court's approach to insurance matters?

A. Oh, yes. Yes, sir.

Q. Can you explain how it is you've come to do that?

A. The California Supreme Court has been a leading court on torts and insurance issues for a long period of time, surely since the '50s and '60s, through the '70s and '80s, so it wouldn't be much of a class if one didn't devote some time to California cases.

Q. Did there come a time when you were retained by Continental and Pacific in this matter?

A. Yes, sir.

Q. When was that?

A. I think the first call was in April of this year.

Q. And what were you retained to do?

A. Well, I was asked to look at these coverage cases and look at California law and develop some valuation of what the likelihood was or is that the California Supreme Court might overturn the court of appeals or Superior Court rulings in these cases.

Q. Can you describe briefly what materials you've reviewed in connection with your work?

A. Yes. I've reviewed all the briefs--well, I've reviewed a lot of the briefs in this case, the briefs to the court of appeals and some of the briefs at the Superior Court level, I've of course reviewed the Superior Court opinion, the appeals court opinion and case law in California and in other jurisdictions dealing with these issues.

Q. Approximately how much time have you spend in connection with this matter.

A. Well, I calculated for a declaration, I think it was 140 hours at that point. Obviously there's been some more time traveling here.

Q. Now, have you formed an opinion, Professor, about the magnitude of the risk that's facing Fiberboard in the coverage case that are now pending in the California court?

A. Yes, I have.

Q. And can you please state that opinion?

A. I think that there is a significant risk, a real possibility, a real chance that the California Supreme Court might overturn the Superior Court or the court of appeal on one or more of the issues before it. That's not to say that it's an obvious case or a slam-dunk proposition, but I think there's a very significant risk that one or more of these issues might be overturned.

Q. And do you have an opinion as to which issue is most likely to be overturned.

A. Yes, I do.

Q. And what is that?

A. I think the scope issue and the trigger issues are those that are most likely to -- to be overturned by the California Supreme Court, though again when I say most likely, I don't want to say that I -- that I would guarantee or that anyone could predict to a certainty that they would be overturned, but I think the greatest chance and a very significant chance exists for reversal on those issues.

Q. Professor, I'd like to direct your attention to August 27th or 1993, and ask you whether you formed an opinion whether as of that time it was a significant risk that the California court, Supreme Court, if presented with the issues, would rule in favor of the insurers.

A. Yes, I did form an opinion based -- I understand the importance of that date, and what -- I have formed an opinion about the chance of a reversal as of that date.

Q. What is that opinion?

A. It was the same opinion. I think that there is or was on that date a significant risk that one or more of these issues might be reversed by the California Supreme Court.

Q. Now, could you state, sir, what factors briefly led to your conclusion?

A. Well, two -- two general -- put in the most general way, two factors:

The first is that there has been a trend in the laws in other jurisdiction, but also in California to reverse the direction of expanding

Testimony of George Priest, insurance law expert Tr. 794

CROSS -EXAMINATION BY MR. INSELBUCH

Q. Your view is that the greatest risk of reversal was in the area of scope and trigger, is that correct?

A. Yes, sir.

Q. What would have been the effect to the asbestos plaintiffs had the Supreme Court reversed -- Supreme Court of California reversed on that basis?

A. Well, I haven't studied the claims in detail or the claims pending, so I can't give you a precise answer to that, but it had to be devastating to the plaintiffs, because the coverage that would then be available would have been, as I understand it, largely exhausted. The coverage from Pacific and Continental would have been reduced very dramatically, depending upon what the holding was. Perhaps eliminated entirely. So the effect on plaintiffs would have been very severe.

MR. INSELBUCH; Thank you, Your Honor.

THE COURT: Any other?

Mr. Baron?

BARON: Can I just ask it from here?

THE COURT: Surely

Testimony of Katherine Kinsella, director of class action notice program Tr. 796-814

Ms. Kinsella's testimony. They're before the court and distributed to all parties, Continental exhibits 7 through 13. We move them in evidence.

THE COURT: Any objection? Admitted.

DIRECT EXAMINATION MR. BOFFA

Q. Ms. Kinsella, how are you currently employed?

A. President of Kinsella Communications.

Q. Are you also a senior consultant at the Kamber Group?

A. Yes, I am.

Q. What degrees do you hold?

A. Bachelor of arts in English literature and education, and a Master's degree in English Literature.

Q. After you received your master's degree, did there come a time when you went to work for the Kamber Group?

A. Yes.

Q. What is the Kamber Group?

A. It's a very large public relations and communications firm based in Washington, D.C.

Q. What was your position with the Kamber Group?

A. When I started, I was a senior associate.

Q. And, very briefly, what were your responsibilities?

A. I handled clients in the marketing, advertising and public relations area.

Q. And did you then become director of public affairs?

A. Yes, I did.

Q. And what did you do in that position?

A. I had oversight responsibility for the public relations, marketing, advertising, direct mail and event management for the firm.

Q. Did you then became a director of marketing and advertising?

A. Yes, I did.

Q. And your responsibilities there?
A. I directed all the advertising work the firm was engaged in, and all the marketing work.
Q. What experience did you have in designing legal notice plans while at the Kamber Group?
A. I designed the bar notice for the Manville Trust that provided notice to the health claim and creditors class.
Q. When you say the health claim and creditors class, what kind of claimants were they?
A. They were asbestos health claimants.
Q. Was that a national notice plan?
A. It was both a national plant and a Canadian plan as well.
Q. Did there come a time when you left your position as director of marketing and advertising at the Kamber Group to start your own company?
A. Yes, correct. I left about four years ago.
Q. Is the company that you started consulting communication?
A. That's correct.
Q. What is the business of consulting communication?
A. I specialize in marketing and advertising work, but for the past few years I've been primarily doing class action notice work.
Q. Were you in fact involved in the design and implementation of the notice plan in the Georgienne against Amchem Products class action?
A. Yes, I was.
Q. Very briefly, to whom was the Georgine plan directed at?
A. To asbestos health claimants who were exposed occupationally to asbestos.
Q. Were those present claimants or future claimants or both?
A. They were future claimants.
Q. Was that as well a national notice plan?
A. Yes, it was.

Q. Did there come a time as consultant when you were retained to develop dissemination plans in the Ahearn and Rudd class action?
A. Yes, in January of this year I was retained.
Q. What specifically were you asked to do?
A. I was asked to prepare a plan for national and international notice and to be available to implement that plant if it were approved by the court.
Q. Did you in fact design notice plans for the Ahearn and Rudd actions?
A. Yes, I did.
Q. Who were the Ahearn and Rudd notice plans designed to reach?
A. Two classes: The health claimant class and a third-party class.
Q. Very briefly, what is the relationship between the Ahearn notice and plan and the Rudd notice plan?
A. It's essentially the same plan. They were done -- it was one plan, one media outreach to reach both classes in both class actions.
Q. Is that because the classes in the Ahearn plan and the analogous plan in the Rudd plan are substantially the same?
A. Yes, sir.
Q. In designing the notice plans in Ahearn and Rudd, did you seek to provide notice both to the general public at large as well as to specifically-targeted groups that were likely to contain class members?
A. Yes, I did.
Q. In designing the notice plan in Ahearn-Rudd, how were you able to identify target populations to whom you would be directing notice?
A. I prepared a database with material that was provided to me by Fibreboard. I looked at works -- alleged work sites for cases that were paid and were pending against Fibreboard and its insurers, I looked at all the cases that had been filed against Fi-

breboard and its insurers throughout the country and I assigned them to geographic areas so that I could target my media to reach those areas where I thought it was most likely to find significant numbers of people who were likely to have been exposed to Fibreboard products.

Q. In that process of doing additional research, did you also identify relevant products and manufacturers, occupations, known claimants as well?

A. Yes, sir, I did.

Q. Did you then evaluate certain methods that would best reach the targeted populations that you had identified?

A. Yes, sir. I looked at -- established a -- several target demographics. One was primarily men occupationally -- blue-collar occupationally employed, 45 years of age and older; and I also look at other demographics which would be appropriate for the members of their families, and I established the vehicles that would be best to reach them.

Q. So in fact you were able to select certain methods that would use in the notice program to best reach the target population that you have identified?

A. Yes, sir.

Q. Did you create written description of the notice plans for the Ahearn and Rudd actions?

A. Yes, sir, I did.

Q. And where those submitted to the court?

A. Yes, they were.

Q. And what action did the court take? Do you know?

A. They approved the materials.

Q. After the court approved the notice plans, what did you do?

A. I began to implement the program, I required the printing of the materials, the purchase of the paid media, and the translation of the ads -- the advertisement notice into nine different languages, and the negotiation with the media vehicles, publications, television stations, to accept the advertising.

Q. You mentioned television stations. Implementing the notice plan, television advertising was used as well?

A. Yes, sir.

Q. Was the television advertising done all at once, or was it done in stages?

A. It was done in two what we call flights.

Q. How many advertisements or television notice advertisements were in the first flight.

A. The first flight was a national advertising thrust. We were on broadcast network and cable, we ran approximately 176 spots on that, and 48 spots on network Spanish -- Spanish networks.

Q. when you say Spanish networks, do you mean Spanish language television network?

A. Correct.

Q. How many ads were run in the second flight of the television notice?

A. The second flight was targeted to specific geographic areas where, as I described before, we believed there was a likelihood of a lot of individuals who may have been exposed to Fibreboard products. We targeted 72 me media markets and we ran close to 3,000 spots.

Q. When you say "spots," you mean --

A. Television advertisements. 30-second television advertisements.

Q. What did the 30-second television advertisement say?

A. It told people that there was -- that there were class action lawsuits pending against Fibreboard and if they were either a health claimant class member or a potential third-party class member, and brief descriptions were given of those two classes, that if they thought their rights would be affected by this and they though they might be a member of this class, that they should call the 1-800 number for a complete information package.

Q. You said there was an information package. What was the information package?

A. It had three components:

There was the Rudd notice

The Ahearn notice

And there was also an overview booklet that contained approximately 60 questions that health claimants or third-party claimants might ask about the settlement and the class actions. And it was an attempt to try and put this in layman's language so people could understand very clearly what the notice was about.

Q. How many people have called the 1-800 number requesting notice packages?

A. As of last Thursday, approximately 530,000 people have called either the English-speaking line or the Spanish-speaking line.

Q. So you had a separate Spanish-speaking line with Spanish-speaking operators?

A. Correct.

Q. Are you able to estimate the percentage of the general public that was reached by the televised notices alone?

A. When you combine both the national buy and the spot television buy, about 94.2 percent of television households were reached or exposed to the message, approximately, or at an average of about 5.1 times.

Q. You said television households. What percentage of households in the United States, approximately, have television?

A. 98.2 percent.

Q. So we're talking about a very high coverage?

A. Extraordinary reach.

Q. Was advertising in newspapers used as well?

A. Yes, it was.

Q. What did the newspaper -- it was a notice ad?

A. Yes.

Q. Is that a fair way to describe it?

A. [Moving head up and down]

Q. What did the notice ad in newspapers consist of?

A. Full-page ads that basically explained the two class actions, gave the critical points of information regarding settlement;

it informed people what their rights were regarding these two class actions, gave them a 1-800 number and a coupon to respond for more information.

Q. And that was the same 1-800 number that was in the television ad?

A. Yes, that's correct.

Q. Or the same two?

A. Well, actually, there was a 1-800 number to call for information regarding this fairness hearing. But we only published the English-language number in the English-speaking and the Spanish in the Spanish-speaking.

Q. Was newspaper advertising also done in two stages?

A. Yes, it was. We did more of a national campaign the first time. We were in 286 newspapers in approximately 151 media markets throughout the country. The second phase we targeted once again those 72 markets where we believed we would most likely find significant number of people who had been exposed to Fibreboard products. That was 72 media markets. We were in approximately 171 newspapers in those markets in the second flight.

Q. The 72 targeted markets again were the same 72 as in the second round of the TV ads?

A. That is correct. And they ran simultaneously, the newspaper and the television.

Q. And you based your selection of the 72 markets on the sort of reach which you described earlier in your testimony?

A. That's correct.

Q. You mentioned that the notice was translated into nine foreign languages, is that correct?

A. That is correct.

Q. Was the newspaper notice published in foreign newspapers?

A. Yes, it was.

Q. Can you tell us how many?

A. We are still trying to verify in a few places like Palau, P a l a u. Don't ask me where it is?

Q. You don t know where it is?

A. No, no, it's in the South Pacific. I have verified --

THE COURT: Hotbed of Fibreboard activity.

[Laughter]

A. No stone was unturned. I verified about 32 newspapers. We targeted newspapers in 23 countries. I know, even though I haven't verified all of them, that many of the newspapers were - ads were placed because I've been receiving coupons from these places.

MR. BOFFA: Your Honor, I might add that to the extent that we obtain further confirmation either with respect to placement of advertisement in foreign newspapers or the actual --

THE COURT: You can file those when we reconvene on the 9th.

MR. BOFFA: We'll provide that as soon as it's available. Some of the information may not be available till later in January.

Q. Was the printed notice ad also noticed in publications other than newspapers?

A. Yes, it was. We published the notice in Parade magazine and USA Weekend, which are newspaper inserts around the country. They have a total circulation together of about a hundred million, mostly unduplicated. And also The Wall Street Journal, which was designed to reach third-party claimant class members. We ran it in The Wall Street Journal twice. We were also in Business Week in a full-page ad, and we placed an ad in the American Association of Retired Persons bulletin which reaches 22 million people.

Q. Just referring back to your answer in references to Palau, why, in choosing places overseas, how did you select those places.

A. I looked at the available sales record for products internationally, I looked at where claims were filed internationally, and then because of the type of product that Fibreboard manufactured,

products, in the insulation area, I was informed that they were used extensively in shipbuilding. And I was able to get several volumes of information regarding where the Navy and other marine services repaired vessels in the World War II, the Vietnam War and the Korean war. And it was a very thorough documentation. We targeted all of those areas so that we could reach any civilians who might still be living in that area, who might have worked on, removed or worked on asbestos that had been provided by Fibreboard.

Q. Does Palau fit the category that you just described?

A. Yes, it does.

Q. Was notice provided through any labor or trade publications?

A. Yes. We were in approximately 25 national and international labor publications, and several local ones, with circulation of over 3 million. We were also in trade publications that were selected based on the industries that would have been most likely to use asbestos products. Maintenance industry, asbestos abatement, aviation, construction, et cetera.

Q. Did you also select trade publications that might reach third-party claimant class members?

A. Yes. Some of the trade publications that we used would be reaching both individuals who were health claimants as well as third-party claimants.

Q. So there would have also been legal, medical publications?

A. Yes, that's correct.

Q. How were the union publications chosen, or labor publications?

A. We did an analysis of the kinds of occupations that labor union members would be involved in, and we selected, I believe, 86 international and national unions to whom we mailed notice to leadership quite deeply. We mailed to about five key leaders within each of those national unions, including their general counsel and health and safety officers, as well as president and vice

president. Then to the leadership of AF-CIO state federations, local and state building trade unions, and also to about 14,000 local unions whose membership might have been exposed to asbestos.

Q. If you could try to take pity on the court reported and slow down just a tiny bit.

When you say mailed, were these notice packages that were mailed, or were they advertisements?

A. They were notice packages mailed to the leadership. In reaching -- in negotiating with a number of the unions to mail directly to their membership, we mailed a shorter form of notice which was essentially the full-page ad that had appeared in publications, and it also listed the occupations and products associated with asbestos use. And we mailed that to the individual memberships of seven international and national unions, and they would have a 1-800 number on that document that would allow them to self select and call the 1-800 number if they felt they fit into the health claimant category.

Q. Approximately how many of those notice ads were sent out to union members?

A. Approximately 1.4 million.

Q. Now, there were also, though, advertisements placed directly in union or labor publications.

A. Correct.

Q. Now, you just mentioned direct mailings to union members. What other efforts did you make to provide notice to specific-identified individuals or groups?

A. We mailed the described full-page ad that we mailed to labor unions to about 400,000 veterans, we mailed full packages to about 6500 companies who were either involved in shipbuilding or oil-and-gas refining and exploration, we mailed in the third-party area approximately 30,000 packages which went to longshore insurance carriers, chief executive officers of workers' compensation insurance companies, to all of the co-defendants' entities that were manufacturers, distributors or third parties involved with Fibreboard. We mailed extensively both to third-party class members as well as to health claimant class members.

Q. You mentioned that you mailed out the notice package to approximately 530,000 people who called the 1-800 number. Were there other notice packages mailed out directly to persons you had identified?

A. Yes. We were able to get permission from the court to mail to individuals who called the Georgine 1-800 line and also the list of those who had opted out of that class action. And that was approximately 590,000 names that we mailed. It was some bit of duplication in that, but not extensive.

Q. What about the persons who had worked at sites where Fibreboard asbestos had allegedly been used?

A. We identified about 209 companies where we felt there were a significant number of alleged claims. And we mailed to all of those chief executive officers and we call them up an average of two or three times to try and negotiate usage of their employee list to mail those directly to them. We were able to secure 175,000 names to mail directly to people who were currently employed or who had recently left the company.

Q. Were notice packages mailed to members of asbestos victims groups?

A. Yes. We mailed -- I think we provided 10,000 copies of the full notice package to the White Lung Association, and then I believe we mailed -- we provided them with an additional 31,000 fliers that they distributed.

THE COURT: The court had received as I recall, in letter form, what the court interpreted as a motion from the White Lung Association essentially requesting an extension of time to distribute packets. I'm going on memory now. And the court granted that. Did you have follow-up contact with the White Lung Association? Did they report to you, at least, that they had accomplished distribution?

THE WITNESS: Yes. We requested from them an affidavit or a document that would certify that they had delivered

these. I believe of the 10,000 - 10,000 packages we gave them, I think they delivered close to 9800.

Q. The court had also granted the right to appear to White Lung Association, but to my knowledge they have not appeared. Or no one has identified themselves, at least, from the White Lung Association.

Go ahead.

MR. BOFFA:

Q. Ms. Kinsella, can you estimate approximately how many notice packages were sent out in total.

A. The full notice documents, we distributed more than 1.4 million.

Q. What is the cost of the notice program that you have carried out in the Ahearn and Rudd actions?

A. It is someplace between 18 and $20 million, which includes all the expenses related to providing notice, printing, 1-800- lines, as well as all the paid media.

Q. You mentioned that you were involved in the Mannville notice program. How would you compare this notice program with the notice program that was used in the Manville proceedings?

A. This notice program was, first of all, an

Testimony of Katherine Kinsella, director of class action notice program Tr. 823-824

CROSS-EXAMINATION BY MR. BARON

Q. Hello, Ms. Kinsella.

A. Hello, Mr. Baron.

Q. Do you have a copy of the notice material with you?

A. The package itself?

Q. Yes.

A. I do not.

[Laughter]

MR. BARON: I've got everything else.

PROFESSOR GREEN: You can call the 1-800 number

[Laughter]

MR. BARON: I happen to have one here in the Rudd case, which I think is identical in terms of the [Pausing]--

Q. Ms. Kinsella, I take it that you are familiar, are you not, with the definition of who is in this class?

A. Yes, I am.

Q. All right. I want to ask you some questions about how you targeted certain components of the class to give notice to those people. Among the people included in this class and who would be barred from ever exercising their legal rights to sue Fibreboard are all past, president and future spouses, parents, children and other relatives or their legal representatives of the class members that had been previously defined. What's a future spouse? What does that term mean? Who is a future spouse?

A. I believe that it would be a -- my interpretation of that, when I read it, would be a spouse that was a spouse of a future claimant, not a future spouse.

Q. Were you given information that indeed this class consists of women who 10 years from now might marry asbestos victims?

A. That's a possibility. I wasn't given that information specifically.

Q. So you don't know whether they're members of the class or not? Can you give me an opinion?

A. I think they would be members of the class.

Q. All right. How would you target a woman who might 10 years from now fall in love with a man who happened to be exposed to asbestos 30 years ago?

A. What was the workhorse of this notice campaign was television, both national and spot television. You don't just buy one demographic on television.

Testimony of Katherine Kinsella, director of class action notice program Tr. 831

differ. We do an analysis and know exactly what percentage of blue-collar workers read versus which were light or heavy television viewers. So you hope you've reached these people using many different vehicles in many different way.

Q Do you watch TV?

A. Yes.

Q Do you read the papers?

A. Yes

Q. Up until I asked the question a few minutes ago, you didn't know that women who married asbestos workers in the future were members of this class, did you?

A. I didn't think of it in that terms, but I bought media that would have covered that.

Q. But you sure weren't aware of it, were you?

A. Not specifically.

Q. Ms. Kinsella, let's turn to another class of people here who were targeted. I'm going to give you what really isn't a hypothetical, but I'll call it a hypothetical, because it actually is the truth. About a month ago I had a dentist come into my office, who is a friend of mine, who had just been told that he had mesothelioma. He had forgotten but that during high school he worked as a gofer in a

Testimony of Katherine Kinsella, director of class action notice program Tr. 834-835

that men do that more than women do that or not? You can settle this.

THE WITNESS: I can only testify in my household, and it's true.

[Laughter]

THE COURT: But for those individuals who do flip around, did I understand you correctly to say that you did have simultaneous notices at the same time?

THE WITNESS: I would have to go back and examine the record very carefully from each television station; but I think, yes, there were some simultaneous, but not that many. I would say it was much -- much lower. You have a 24-hour period to run the spots and you're running maybe five channels in a particular media market for seven days. It would be some simultaneous.

MR. BARON: Your Honor, I had one other question on my list I forgot to ask. I apologize.

Q. Ms. Kinsella, how did you attempt to notify children who hadn't been born yet?

THE COURT: Counsel, I expect responsible questions.

MR. BARON: Your Honor, they're members of this class.

THE COURT: That's not a responsible question. You don't have to answer that question.

Any other questions of this witness?

Thank you, ma'am. You're excused

[Witness sworn]

MR. INSELBUCH: If I may, Your Honor, we've had a bit of trouble with our photo duplicating system, but I would like to hand up two exhibits to the court. They are marked Class Plaintiffs 1011 and Class Plaintiffs 1010. The first is Dr. Nicholson's CV and the second is the report that he did render to class counsel. All of these documents have been circulated in discovery and in detail.

THE COURT: Tell me the numbers again.

MR. INSELBUCH: Class Plaintiffs CP 1011 and CP 1010

THE COURT: Any objections

MR. BARON: None

THE COURT: Admitted.

MR. INSELBUCH: May I approach the witness briefly?

THE COURT: Yes, sir.

Testimony of Steven Kazan, class counsel Tr. 903-917

Q. But in general is your memory the same as what you heard testified?

A. Generally, yes.

Q. And if I were to ask you the same question about the time course of the Fibreboard insurance litigation, did you follow that as well?

A. I also followed it. I'm not sure I followed it quite as well as Mr. Wartnick did. But, yes, I was aware of it, read the opinions, read the briefs, kept current on what was going on, talked to people at Brobeck about it and so on.

Q. Let's talk for a minute about the Andres case. What was the Andres case?

A. Well, the Andres case, as the term has been used here, was a group of 124 separate cases that we negotiated with Fibreboard starting in March and concluding in April of 1991 on an assignment basis. 119 of them were pre-'59 cases in which we accepted pure assignments of Fibreboard's rights against Continental; the other five were post-'59 cases in which we accepted pure Fibreboard notes.

Q. Was one of the terms of the settlement a requirement that Fibreboard pursue the validity of the assignment against its insurers?

A. Yes. And indeed that was a term that they -- we insisted that they agree on doing that before we were willing to even negotiate for assignments.

Q. And was that agreement pursued by Fibreboard?

A. [Pausing]

Q. Did they indeed seek to enforce the assignability against their insurers?

A. Yes. They filed a declaratory relief action, I believe, on April 1st of '91.

Q. Was that decided in the California state trial court level?

A. Eventually.

Q. When was that?

A. I believe that the final judgement of the trial court was entered in September of 1992.

Q. And what was that judgement?

A. We won.

Q. Meaning that the assignment was enforceable against the insurer and was reasonable?

A. Yes and no. They brought suit -- Fibreboard brought suit to determine both the right to assign and the reasonableness of the individual settlements. After a year of discovery and machinations and motions and all kinds of things, Fibreboard won the motion for summary judgement on assignability. CNA then offered, as I recall, to stipulate to judgement on that and obtained a court order severing the reasonableness, which was then technically dismissed out of the Andres caption. So the court's decision was on assignability. Fibreboard, in October of '92, filed a separate complaint to adjudicate the reasonableness of the 119 settlements.

Q. What became of that?

A. What became of that was that effectively on the eve of trial, CNA entered into a three-party agreement with us and eliminated the need for that trial.

Q. When was that?

A. Well, the trial date --

Q. Was it before August 27, 1993?

A. The agreement was made then. The trial date was in July of '93, as I recall. We agreed on the deal, there were complexities in drafting the paperwork, and as best I was able to determine, I think the final agreement was in fact signed on September 1, '93. But that was the memorialization of an agreement reached months prior.

Q. Now, during the course of proceedings in the Andres matter, were you aware that there were other similar litigations pending in which other assignment settlements were being presented for approval of the assignability to other courts.

A. Oh, yes, yes.

Q. And who among your colleagues were you aware was also proceeding on that path?

A. Well, certainly I knew of the Ness Motley proceedings, I knew of the Comino proceedings, the proceedings in New York with Weitz & Luxenberg, I believe, the Wilentz firm, Chris Placitella's office was involved, in something similar. I can't cite the chapter and verse at this time. But we were all in full communication.

Q. There was a full program of enforcing those assignments, was there not?

A. There was a full program whereby Fibreboard would seek an adjudication in various courts of the validity of the assignments. They would come up on the courthouse steps and CNA would fold and make a deal.

Q. What was the importance of enforceability of those assignments to you on behalf of your clients?

A. Well, first, on behalf of my clients in the Andres group, specifically, let me put it this way: The whole Andres group came out of a court program in Alameda County where the court, having previously had a backlog and having frozen all the civil litigation except for dying plaintiffs, decided to consolidate some 500-plus cases for trial to clean up the backlog in one fell swoop. And we were gearing up to go to trial on all these cases, as were other lawyers in the county. Other cases in the county. Fibreboard expressed an ability to explore an assignment of these cases. We had a decision to make, which was: Do we make an agreement with Fibreboard and then focus our attention on essentially the Owens-Illinois, Pittsburgh Corning, Owens-Corning group as our targets? Or do we try the cases against Fibreboard, who was, after all, our single biggest defendant, and try to deal with the others? When Fibreboard expressed a willingness to settle, we wanted it to be a meaningful settlement. At this point, the SSP on pre-'59 cases was effectively no longer a viable program. And the one thing we did not want to do was reach some kind of

settlement with Fibreboard that years down the road some court might determine it was invalid and then we would be back having to ask our court to consolidate a new trial on all these cases that had already been tried. So we were only willing to consider an assignment if it truly seemed meaningful. And that's why we insisted on as immediate adjudication as we could get of their right to make the assignment. Because if they couldn't properly make the assignment, it wasn't going to do us any good. That's with respect to that group of clients.

Q. In the context of the negotiations towards a global settlement that were continuing in the 1993 time frame, what was the significance of the decision in Andres?

A. [Pausing]

Q. What was the significance of the decision holding that the assignment by Fibreboard of its rights against its insurers to settle its cases with the individual asbestos plaintiffs had for those negotiations?

A. That was the other part of your previous question. The whole issue of assignment was of critical importance to us in the global negotiations, because at that time, through '91, we were negotiating settlement, the thrust of which was to be an assignment by Fibreboard had the right to do that. That was clearly an issue, we fully expected CNA to raise that issue. And we pursued Andres to a decision because establishing at the trial court level Fibreboard's right to make this assignment, in effect, held the window open to create the opportunity to make a global settlement based on the assignment. If we lost at the district court level -- I am sorry, at the trial court level in Alameda County, I don't think that the people at CNA would have been really worried about Fibreboard assigning its rights to the policy.

Q. You say there was a window open. Did that window close?

A. Well, obviously we made the agreement in the summer of '93 -- we made an agreement in the summer of '93 and a final agreement in December, but in mid-October of this year our ap-

pellate -- intermediate appellate court reversed the trial court, erroneously in my view, Your Honor, and held that CNA had fulfilled its obligations, that Fibreboard had no right to make the assignments and that the assignments were invalid and remanded the case with directions to the trial court.

Q. Was rehearing sought?

A. Fibreboard sought rehearing in the appellate court and it was denied.

Q. Was an appeal sought from the Supreme Court of California?

A. The last I hear, Fibreboard did seek review in the Supreme Court. I don't know that it's been ruled on.

Q. As it turns out, there was substantial uncertainty in the summer of 1993 whether or not Fibreboard was empowered to assign its rights against CNA.

A. There was uncertainty about Fibreboard's right too make the assignment, at least in my mind, from the day they first suggested that in early '91.

Q. Now let me shift your attention now for a moment to the nature of claims that asbestos victims can have. Under the law in California, is a cause of action stated for medical monitoring?

A. Yes, there is. Or one can state a valid cause of action for medical monitoring in the toxic tort/asbestos area.

Q. And is there a cause of action on behalf of those people if the facts support it as well as punitive damages?

A. Yes, you can certainly seek -- you can legitimately plead and seek punitive damages in a complaint for medical monitoring, under California law.

Q. Now, to bring these things to the end of the trail, Mr. Kazan, you were part of the group that negotiated the settlement in Ahearn.

A. Yes.

Q. Do you have a view that you can offer to the court about whether or not you think the Ahearn settlement is fair?

A. Certainly, I do have a view.

Q. Please tell the court.

A. I think it's a very fair settlement, certainly for the members of the Ahearn class.

Q. Why is that, sir?

A. Because in the context that we were dealing with from the start in 1991 and up through the time that the agreement was reached in 1993, just focusing on that period, there was very grave risk involved for members of this class. Fibreboard was a small company that was very important in certain areas of the country and, as Mr. Snyder explained, through the ACF, became increasingly prominent in other areas of the country. It was a company that was effectively swamped by its asbestos exposure. The best illustration of that is this is a company that had around 4 million shares of common stock and at a relevant period it was trading at two, three, four dollars a share. The market was valuing this company at 10 or 15 million dollars when it had assets, as we've heard here, that place it in the 200. 250 million-dollar range, net of asbestos exposure. It had run through most of its insurance coverage, it had left its insurance claims in the California courts and if it lost its coverage, it was all over. If it won its coverage, in my view, it was still all over, but it would have been a slower and more painful death. The risk involved with the insurance coverage litigation was, in my view, very substantial. I don't know that I could have articulated it with quite the elegance of Justice Kaufman, you know, but he was one of the guys at the time who was on the court, and we knew that there was a good result in the trial court, we were optimistic about the intermediate appellate court, although clearly there was substantial risk there, and frankly although we tried not to show it we were scared to death about the California Supreme Court. So there was a very great risk, as we saw it -- as I saw it. There was an opportunity to get a handle on the magnitude of the problem and to reach resolution that would secure adequate reasonable and historically-based compensation for all of Fibreboard's future victims in a system that I thought could work well that would eliminate not only the

insurance coverage risk but also eliminate the risk of further adverse changes in the complexion of the tort system that we've been having to face in California for basically at lest the last 10 years. And all in all, it just seemed to me that this was a very reasonable and appropriate solution to the problem, and in fact an exercise that I was proud to be part of.

Q. One of the terms of the global in Ahearn was a requirement that Fibreboard and its insurers enter into a backup, so-called trilateral agreement, was it not?

A. Yes

Q. And why was that something that the counsel on behalf of the plaintiffs insisted on?

A. We were real scared about what the courts would do in the coverage case. And obviously a loss would be devastating. A win wouldn't be so great either. And we wanted to make sure that the -- that the future class, the future victims would be protected. We knew that there would be attacks made on a class action settlement. That was obvious to us from the very beginning. And not demonstrating any lack of confidence in the Fifth Circuit or anything, but I learned a long time ago that when you go to court sometimes you lose. And we just want to make sure that we were protected and that the victims were protected in the event that a global settlement was not approved. To coin a phrase, it was an insurance policy.

Q. Comparing the situation that the Ahearn class members would find themselves in under the regimen of the global with that under the regimen of the trilateral, which do you think is to their advantage?

A. The global to the trilateral? The global is -- is far superior.

Q. And what is that, sir?

A. Well, a variety of reasons. We think -- and I think it's the general consensus in the plaintiffs' bar, that we've finally got it right, that the trust system and organization of the trust distribution process is very carefully and well designed and will function

very well with adequate input from -- from the victims and their attorneys over time, that it will very efficiently and fairly handle all future claims, and that with quite a high degree of confidence it will be able to pay all future claims in light of past history, and to do so in a very cost-effective way.

The contrast with that is under the trilateral we have a Fibreboard which can call on $2 million plus its equity net worth, whatever you want to call that, to deal with obligations that not only would be owed to future victims but also to a variety of unsettled present cases and other unrelated to asbestos personal injury claims matters. And to put it sort of as nicely as I can, I have been litigating against and with the Brobeck office since 1978 or 1979 with respect to asbestos matters. They are very, very good, they are very, very expensive, but well worth it, I'm sure, to their clients. They have the capacity to really litigate these cases. They can put on a better defense -- I guess the analogy would be a full court press, only they put 12 guys on the court instead of five. And we've seen that in San Francisco, we saw it when they were working for the ACF. we saw it when they came out of the ACF, we saw what they did in our area to drive down the values of cases, and particularly to squeeze virtually all of the value out of the unimpaired types of cases in at least the northern California area. I think that's what Mr. Snyder referred to as to a technology that they were not able to export at that point. It's clear to me that if Fibreboard comes back into the litigation system the Brobeck office will be charged with supervising a national approach and they will see to it that they export this technology. It will get very expensive, they will spend a great deal of the available money on defense, they will reduce the values that are paid to Plaintiffs, as Mr. Snyder promised us he would when he testified yesterday, the net result of which is that a relatively small proportion of that money will ever go to victims. I am confident that they will run out of money. And at some point down the road, it would be my expectation that we would see Fibreboard in a Chapter 11 where they would decide that they had done what they needed to drive

down the values, they no longer wanted to be burdened with just the aggravation of being involved in litigation, with the drain on corporate energy. Aside from hiring lawyers, you have corporate witnesses who get dragged into court, you have document requests, you have a whole infrastructure that needs to be devoted to this. And at some point I think Fibreboard would likely go into a bankruptcy court, say, "We have $500 million left and we don't want to waste it all, so Judge, you whack it up among the victims and let us go on about our business." I think it would be a disaster. But it wouldn't happen as quickly as the disaster would happen if they lost the coverage case.

Q. How long out in the future do you foresee that disaster?

A. Which disaster?

Q. The eventuality that they would run out of money and seek protection under the chapter.

MR. BARON: Objection, Your Honor

THE COURT: Overruled.

A. Under a trilateral.

MR. INSELBUCH:

Q. Under a trilateral.

A. I think they likely would be around for five years. I doubt they would be around for 10.

Q. And if Mr. Snyder were unsuccessful in, as he describes it, exporting the technology and indeed he could not drive down the values of the plaintiffs' cases, what would happen then under the trilateral?

A. Oh, then they wouldn't last five years. My view is that if they hit the tort system, let's say a year from now, by the end of appellate review, they will have however many cases they're going to have

Testimony of Steven Kazan, class counsel Tr. 924 - 925

THE COURT: Let me try to characterize at least my understanding of one other piece of your testimony. If for some reason this court or an appellate court disapproves the class action and the trilateral agreement kicks in place, did I understand you fairly to say that perception in the plaintiffs' bar is such that that will provide also a fleeting opportunity to participate in funds that will not be available for a long period of time and you would anticipate a high level of early filings as a result of that?

THE WITNESS: Your Honor, if this class action flounders and if the trilateral takes effect, it is my opinion that you will see a feeding frenzy among the plaintiffs' bar the likes of which you have never seen, and I have to tell you that I will do my very best to be in the front ranks of that. I'm going to have a hard time getting ahead of Mr. Baron and Mr. Jaques and Mr. Motley, but I'm going to be there, as will every other plaintiffs' lawyer, to do the best they can for their clients, because that's all of our responsibility. The result is going to be a long-term disaster for the future victims, who in that context none of us will represent and with respect to whom none of us will have an ethical obligation to protect. We will have an obligation to protect our present clients. You'll see, if I can put it this way, exactly what you saw in Manville, in the bankruptcy, where the bankruptcy court made clear that the plaintiff's committee was responsible only to the present claimants, that there was a representative for future claimants to whom we had no fiduciary duty. And we all did our job. We did a great job for our clients. And the result was a disaster for the future victims. And you're going to see that again. But magnified.

THE COURT: Were you through, counsel?

MR. INSELBUCH: I was, sir.

THE COURT: Proponents?

MR. WACHTELL: I have a couple of questions, Your Honor.'

THE COURT: Yes, sir.

Testimony of Steven Kazan, class counsel Tr. 930 - 932:

witness or go ahead?

THE COURT: Go ahead.

MR. WACHTELL: I'm sorry, Your Honor.

Q. You referred to the Andres litigation and to the reversal that took place in October of this year, 1994, of the Andres decision. Now, you were aware -- were you aware back at the time of this assignment program that Continental was taking the position with Fibreboard that the assignments were a material breach of the insurance contract?

A. Yes.

Q. Am I correct that in August of 1993 and in December of 1993, you were aware that there was a risk of reversal of the Andres decision by the California appellate courts?

A. Yes. And your question remind me that one of the things that we insisted on is a term of our assignment agreement, and one of the reasons we asked -- insisted that they go to court was a term that if -- if the court said there was no assignability or if the assignability -- if the assignment would vitiate coverage, that the deal was off. We knew we were taking a risk that we could end up with a situation where even if Fibreboard won the coverage case we would lose coverage on Andres -- on the Andres group because of a potential finding that making that assignment was a breach that vitiated the coverage. And that was one of the factors that led to our ultimately agreeing to a three-party settlement with your client.

Q. You heard Mr. Snyder's testimony that the assignment program drove up the values, is that correct?

A. I am pleased to say that we helped him do that.

Q. So that the risks that existed in August of 1993 and December of 1993 that the assignment program as such could vitiate

coverage has, in a sense, now, but for the settlement, come home; -- is that correct?

A. Year. Let me put it this way. One of the things I kept in my -- in our three-party agreement, since I couldn't get CNA to pay for it, was I reserved the right to pursue the bad-faith claim against CNA under the policy that had been assigned to me. Since the Andres decision has come down, I've tried to settle that with your clients and they haven't really been willing to make an offer.

[Laughter]

Q. I can't imagine why.

[Laughter]

Q. What I -- I just want to be clear that you and I are on the same wavelength, Mr. Kazan, and that we have a clear record on this. Were this global settlement to be rejected by the courts and were the trilateral settlement to be rejected by the courts, and if Continental and Fibreboard were back in an insurance coverage mode, am I correct that, as you understand, there would be two problems for Fibreboard to overcome in order to get insurance coverage, the appeals in the California Supreme Court and in the intermediate court of the coverage case and now this new issue as to whether the entire assignment program amounted to such a material breach of contract by Fibreboard that it would vitiate coverage?

A. That certainly is now a major issue.

MR. WACHTELL: No further questions.

THE COURT: 1:30; gentlemen.

[Lunch recess]

MR. KOPLOW: Your Honor, if I might ask the court's indulgence for a moment before the parties proceed with the examination of Mr. Kazan, we had earlier this week mentioned that there were amendments in the offing to -- largely to the trust agreement. And I believe the court is aware that a stipulation of settlement has been reached in the

Testimony of Steven Kazan, class counsel Tr. 939-944:

information that we've obtained in the past with others and would like at least to think that some of the information we provided has been of assistance to those of my colleagues who have nailed you but good in various courts.

Q. Well, okay.

A. "You" meaning Fibreboard.

Q. Certainly. And from that vantage point, Mr. Kazan, would you tell us, please, your views on the propriety of the waiver or elimination of punitive damages in the agreement we're discussing?

A. I think it is at the very least a reasonable compromise and concession on behalf of the future class, with one minor exception that I think Mr. Snyder mentioned. The only lawyers in the country who have ever gotten punitives against Fibreboard are me and Ness Motley. And I just don't think it is a major factor. Fibreboard is not a defendant -- I want to put this delicately in case we're back litigating this issue under a trilateral. The punitive case against Fibreboard is not of the magnitude of the case that exists, for example, against Manville and Raymark and Turner and Newell and Celotex and Owens-Corning and Pittsburgh Corning.

[Laughter]

Q. Very well. To the extent you can, bearing in mind there is some sensitivity about these matters for obvious reasons, can you tell us whether you count yourself as being sort of in the top tier of lawyers with respect to settlement averages with the company?

THE WITNESS: Your Honor being under oath excuses any requirement of modesty?

THE COURT: Truth, counsel.

THE WITNESS: I am sure that my settlement averages with Fibreboard, with the possible exception of some things that might have happened in His Honor's courtroom as a result of certain trials, is well above that of any other firm in the country.

Q. And again considering the perspective from which you speak in that regard, would you comment on the limitation or cap of damages in the agreement we're here to discuss?

A. I think it's again a reasonable thing for the future class to have agreed to. I was going to say given up. But I don't really think it's giving up anything of real import. Mr. Snyder said there have been a dozen cases in which Fibreboard has paid in settlement in excess of $500,000. There are several of those that I could not account for, but it doesn't happen very often. I mean, you can settle what, a hundred, hundred fifty thousand cases, something on that magnitude. It's not a real problem. And by the time you factor in consideration of anything resembling the aspect to the victims, the 500,000 limitation under the trust distribution process and the settlement agreement is really no significant limitation at all.

Q. You were asked a question about medical monitoring. and I want to take you to that for just a second and ask you whether or not it is your understanding in California that you can state a claim for so-called medical monitoring, and if the facts justify it --

THE COURT: Counsel, I think you should develop on the record what medical monitoring is.

MR. MILLER: Yes, Your Honor. That's exactly what I was going to do.

Q. And the first question is: What is medical monitoring?

MR. BARON: Your Honor, I object unless he's referring to a specific state law. Because it is very, very different in the states that have adopted it. And again, as the court is probably aware, many states have refused to adopt it. So we have to limit it to a state.

MR. MILLER: Your Honor, I would be delighted at this point to limit my questions to California.

MR. BARON: Okay.

A. It's been a lot of years since I worried about remembering case names. Published opinions.

MR. MILLER:

Q. There is a case, though?

A. Yes. California law makes it clear that one who has had exposure to a toxic substance with a potential for latent disease resulting from that is entitled to bring a claim for medical monitoring, which is to say appropriate medical surveillance, in the absence of any impairment or demonstrated physical injury. In other words, if it is reasonable under the circumstances, given the substance to which one is exposed, et cetera, medically, then California law permits recovery of the expenses of a medical monitoring program designed to achieve an early diagnosis of the ill-effects of that exposure.

Q. All right. Now, bearing in mind what we've heard about the medical aspects of this situation, is it your understanding that such a claim can be stated even in the absence of any palpable, physical, clinically detectable disease or injury as we would ordinarily think of those conditions?

A. Yes, that's precisely what it means. If there's what you would call a palpable injury or a disability or an impairment, then medical monitoring as we're talking about it is simply an element of medical special damages consequent upon the injury. It doesn't necessarily have to stand on its own. Medical monitoring claim, as I'm using that, is one in which there is no manifested injury, but simply by virtue of the history of exposure it is considered appropriate that there be medical surveillance.

Q. And is it your understanding as a lawyer, bearing in mind the State of California law on the subject, that you could make and indeed do make good faith claims for such damages, in other jurisdictions as well?

A. Well, my practice on behalf of individual plaintiffs is confined to filing suit in California. Or at least it has been up to now. Let me say that assume a history of exposure to asbestos. I think that a plaintiffs' attorney can in good faith, consistent with ethical obligations to clients and the court, file suit against a company like Fibreboard seeking recovery for medical monitoring. And if

we're talking about Fibreboard, it could as well justifiably and in good fath and appropriately allege a claim for punitive damages.

Q. One last topic, Mr. Kazan. That is, did you sometime in 1993, contact Dr. Nicholson to get an update or some corroboration or the like with respect to his projections?

A. Yes.

Q. Would you tell us, first of all, why it fell to you to do that and who you learned?

A. Well, I've known Dr. Nicholson for some years and have a particular -- you know, a particular interest, but I'm sort of a medical junky and I like to read this stuff. In our group of counsel, the sort of primary responsibility early on for dealing with the -- the issues of disease incidence, the kind that Dr. Nicholson testified about, sort of ended up with me. We tended to sort of not rigidly but as a practical matter divide certain areas of responsibility. By virtue of my involvement as a -- first a member of the creditors committee and then an adviser to the trustees in the Amatex trust, which has been wrestling with how to go about paying out money to Amatex victims, we obtained just about every

Testimony of Steven Kazan, class counsel Tr. 948-950:

MR. BARON: Thank you, Your Honor.

CROSS-EXAMINATION BY MR. BARON

Q. Good afternoon, Steve. Mr. Kazan. Excuse me. The case that you were talking about in California, by the way, is Potter v. Firestone? Is that the case that you were talking about on medical monitoring?

A. Well, not exactly. I mean, that is one. I think the other case is Miranda v. shell, which Potter adopts and republished. But, year.

Q. In Potter v Firestone, the California Supreme Court also held that there is no claim or cause of action for an individual to recover damages for fear of cancer or increased risk of cancer in absence of a present injury, is that correct?

A. Well, you're mixing two things. Risks of cancer, certainly. And that has not been recoverable in California. I think fear of cancer may be recoverable in the context of what would amount to an intentional tort.

Q. Right, I'm sorry.

A. Okay.

Q. But in the absence of an intentional tort, it's not a recoverable item, is it?

A. [Pausing]

Q. In California.

A. In the absence of some physical injury, I think you're right, that fear of cancer alone is not compensable.

Q. All right. Mr. Kazan, are you familiar with cases like Ball v. Joy Manufacturing and others sunder the law of other jurisdictions that specifically prohibit claims for medical monitoring?

A. Well, I'm not familiar with that case by name, I know in the Potter opinion it lays out conflicts in the state laws and says that there are a variety of jurisdictions which say no. Some are equivocal, a variety that say yes. It chooses that's the better view. I don't think that's relevant particularly, but there is a split in authority.

Q. All right. So in some jurisdictions there is no cause of action for medical monitoring? You would agree with that?

A. I would agree that if citizens of various states file suit in some states other than California, they may well not be entitled to recover medical monitoring. I would not agree that there are people in the United States who are not entitled to seek medical monitoring from Fibreboard.

Q. Well, Mr. Kazan, you've been handling asbestos claims for years and years and years, as you've described. As of today,

have you ever filed a claim for a victim for medical monitoring that has no injury?

A. No.

Q. Mr. Kazan, as a result of the notice that went out in this case, did you get an increased number of telephone calls in your office?

A. Yes.

Q. About how many?

A. Last estimate I can give you is that we have received, either to the 800 numbers that we set up to handle this or to our office, specifically asking about Fibreboard, about 20,000 calls.

Q. Okay. And from those 20,000 calls, how many cases has your office obtained, new clients?

A. By last count, I'm told that we have filed five lawsuits out of that group, but one of those I don't credit to Fibreboard -- to the Fibreboard notice

Testimony of Steven Kazan, class counsel Tr. 955-957

know if we focused on the distinction between people who weren't yet sick or people who hadn't yet filed a lawsuit. But if you're asking did we know that part of what was involved was representation of people whose claims had not ripened in some sense, the answer is yes. That was always on my mind.

Q. All right. And did you understand as early as 1991 that there was at least a reasonable chance that Fibreboard would not be able to pay all of its future claims to asbestos victims?

A. What do you mean by Fibreboard?

Q. by Fibreboard with whatever assets it had available to it.

A. Well, I certainly knew that if Fibreboard ended up with no insurance, it was already in the tank.

Q. Okay. So you believed from the beginning that there was a potential there that Fibreboard really wouldn't have enough money to pay future claims?

A. That was always a possibility.

Q. Okay. And that was always a possibility from 1991 up through the time that you actually reached this deal in August of 1993. Correct?

A. If not sooner.

Q. Okay. Now, during the same period of time you were prosecuting pending present claims that you represented against Fibreboard. Right?

A. Yes.

Q. Okay. Now, Mr. Kazan, from the beginning of the negotiations in 1991 or at the beginning of the negotiations in 1991, did you have a preference as to what type of a class action for future claims might be utilized, what type of a class?

A. Are you referring to the distinction between opt-out and non-opt-out?

Q. Yeah.

A. Okay. All things being equal, yes, my preference was for a non-opt-out--for an opt-out class in the traditional sense.

Q. Mr. Kazan, in your deposition you told me that until CNA made it crystal clear that the only basis upon which it would pay money was on a non-opt-out basis, that up until that point you wanted an opt-out class. Is that true?

A. That was my preference.

Q. Okay. And so, really and truly, the thing that changed your mind was the opening of Continental's checkbook, in your words?

A. Yeah, when it became clear that a deal could not be made on an opt-out structure and that the only way Continental would put up money for future victims was in a non-opt-out structure, and since my preference was if it was possible on appropriate terms to make a deal rather than roll the dice in the California Supreme Court, I decided that a non-opt-out class action settlement was better than the alternative.

Q. Did Fibreboard explain to you that Continental had offered them some number over two-and-a-half billion dollars in July of 1993 to buy out the policy?

A. I don't know that I knew specifically what the numbers were. I think I knew that they were certainly negotiating.

Q. Well, it was your preference, was it not, from the beginning, to see if Fibreboard could just resolve their insurance coverage without you? Right?

A. Well, from the beginning?

Q. From 1991. You were interested in getting Fibreboard's insurance coverage dispute resolved.

A. Well, from 1979, when the dispute started, I was interested in their resolving it favorably, obviously.

Q. Well, is that why you began these negotiations to begin with, so that you could try to help Fibreboard get their insurance coverage resolved?

<u>Testimony of Steven Kazan, class counsel Tr. 960-961</u>:

don't in any way question Mr.; Snyder's integrity or honesty or anything else, but I think that's a pipe dream. I think that the trilateral is not adequate, I think they could not survive in it and I don't for a minute believe what John Roach said in his letter to shareholders.

Q. Okay. Well, Mr. Kazan, if in 1991, when you were beginning these negotiations, Mr. Snyder had said, "Wait a minute. Let's stop here. Continental has come to us and they've offered us a package that will pay presents and futures $3.5 billion in cash now," would you have backed off going forward with the global?

A. Mr. Baron, you're asking me hypothetical questions about what might have been happening at a point in time. And that's really kind of silly. Fibreboard had been in litigation with Continental since 1979. That litigation continued until the trilateral that we forced them to enter into in August of '93. In 14 years they

hadn't settled the case. Had they been able to settle the case, maybe they would have done it. I know there were times when Fibreboard made demands on Continental for a buyout of the policy, and in retrospect at least those of us on certain sides of this deal are very happy that Continental said no. Had Fibreboard wanted to sell out this policy for 200 million or $500 million, presumably they could have done that. And if they wanted to do it and CNA had been willing to pay it, they would have done it. But it didn't happen.

Q. Okay. What you're saying then is but for you, this settlement couldn't have been reached on the coverage. Is that what you're saying?

A. Well, not just me personally, but for the situation that arose, the opportunities that were created by virtue of the assignment program, the hook that Continental was put on and its realization, I presume, that it was facing growing exposure to paying what it perceived to be grossly inflated dollars on settlements and the prospect it was only going to get worse with a global settlement and assignment that brought Continental to the table, something happened that got the attention of the people who owned Continental and that is what led to Continental coming forward and being willing to negotiate and bring Pacific in that led to this coming together.

MR. BARON: Your Honor, I have a request to make, if I might. I'm sorry to have to

Testimony of Steven Kazan, class counsel Tr. 973-978

would be singled out for a so-called feeding frenzy?

THE COURT: He's answered that at some length.

MR. BARON: He has?

THE COURT: And I don't think you want to hear the answer, counsel.

MR. BARON: I'd like to know the answer, because all of these other defendants who have gigantic coverage --

THE COURT: Counsel, tell him again.

MR. BARON: I don't think he has done it.

THE WITNESS: Okay. The hypothetical scenario that I was discussing is what would happen if in 1996 some appellate court concludes that this Ahearn settlement is for some reason inappropriate but the court approves the trilateral and Fibreboard then -- and presumably at that point the stay that is in place here would be lifted at some date.. What I was trying to explain to you is that on the day that Fibreboard returns to the tort system with a backlog of whatever you guys didn't get filed in '93, '94, '95, '96 filings to face in a context where in the intervening time a lot of cases have been settled in consolidations, whatever you want to call it, where Fibreboard is in cases where they're the only remaining defendant, where judges around the country are looking at a situation where they thought they had their backlogs under control and now they've got 500 or a thousand or 5,000 cases in their jurisdiction, with only Fibreboard left, with plaintiffs' lawyers who are saying," we've had to wait on this, Your Honor," and with Fibreboard sitting there with $2 billion in hand, there will be, I am confident, a rush to the courthouse all over the country, lawyers asking courts to move their cases forward to help them get caught up, to consolidate cases. It's like in the movies, Mr. Baron. If you build it, they will come. Okay?

Q. Okay.

A. If Fibreboard is out there with $2 billion for people to shoot at and people understand the chance that Fibreboard will not continue to be out there because I will look at what you and Mr. Jaques and Ness Motley are doing and they will look at what you're doing and everybody will decide that if they're not there first or quick, by the time they do get there, it may all be gone, there's going to be a rush on that fund. That's a unique situation. Doesn't mean --well, it's happened before. You and I and the rest

of our friends did it to Johns-Manville, to the Manville Trust. Okay? And they didn't have much money. All I'm telling you is that $2 billion floating out there is going to attract a lot of attention.

Q. Mr. Kazan, these would be exactly the same people, would they not, who would be willing claims under Ahearn?

A. No.

Q. So people would come out and file claims against Fibreboard in the tort system that would not otherwise file claims against Fibreboard under Ahearn. Right?

A. Well, I don't know. I mean the proof that is required under Ahearn is significantly larger than that which seems to be presented in many courts around the country in consolidations. If you take a court that says, "Oh, we have 5,000 cases here. We're going to trial and we're going to try liability and a punitive multiplier, because Ness Motley and Kazan have showed you guys how to do this, and we'll pick some representative plaintiffs," then nobody has got to worry about all the facts on all their cases, because not every judge would do what I understand what Judge Parker did and other depositions of every plaintiff. I didn't hear that there were 8,000 plaintiffs' depositions in Baltimore, for example, although there may have been. And so what's going to happen is that there are going to be large numbers of cases, many marginal to worthless, presented in jurisdictions all over the country, and the pressure on Fibreboard to settle, to do something is going to be, I think, substantial. We've seen that with other defendants now recently, you know.

Q. Okay. So what you've done to protect against that is that you've made the requirements of the trust more difficult than the requirements of the tort system. Right?

A. Well, I prefer to put it that the Ahearn settlement requires that people be represented -- well, that if a lawyer comes in with a case, No. 1, he has to really represent the client; No. 2, the client has to have met a doctor.

[Laughter]

Q. And under the tort system that's not the case. Is that right?

A. I'm told that there are some of our colleagues who don't seem to adhere to that formality all the time.

Q. Have you done a study on that, Mr. Kazan? Or is that just your judgment?

A. It's in the literature, it's what you hear from lawyers all over the place.

Q. You just decided you would make it tougher for them under the trust? Keep those kind of claims out of the system. Right?

A. No. Any lawyer wants to present one of those claims, he's certainly free to do it.

Q. In terms of getting compensated?

A. No. If there's a claim and it meets the criteria, it will be compensated. The question of whether a lawyer is going to go to the time and expense of submitting a case that he considers to be so marginal that it's not worth any money under this structure is something I leave to you and your colleagues.

Q. So you think it would be much easier to submit a claim that's not worth any money by filing a complaint, having it served and going through discovery than it would be just to fill out a form and send it in to the trust?

A. I think it's a lot easier to file a complaint with a thousand names in a court somewhere than to file a thousand claims with the Fibreboard trust, yes.

MR. CLARK: I object, Your Honor. It didn't prove too easy at all.

[Laughter and applause]

MR. BARON:

Q. Mr. Kazan, it's a lot easier and cheaper to dismiss a thousand cases filed together in one fell swoop than it is to go through a thousand claims, isn't it?

A. [Pausing]

Q. Mr. Kazan, I'm about finished with you here. Judge Parker commented earlier about the time that you were in his court in Beaumont in the case of In Re: National Asbestos Class Action. Do you recall that? That was back in August of 1990.

A. Well, I can't tell you I remember what the caption was. But that is a day that I think I will never forget, Your Honor.

Q. Mr. Kazan, so that it's memorialized forever, I have a copy of the transcript. And among the things you stated at that hearing were, "I confess to being troubled by any program that would seek in some way to limit or absolve cooperating defendants from potential liability to future claimants." Do you still feel that way?

Testimony of Steven Kazan, class counsel Tr. 1008-1009

action? It makes a difference, does it not?

A. I don't understand what any of this has to do with McDermott.

Q. Well, let's assume that there is a value to a claim of a hundred thousand dollars and let's assume that someone runs through Fibreboard class action Ahearn and gets $10,000 from Fibreboard.

A. Okay.

Q. And then let's say there's a tort action down the line and there's a determination, as you must do under McDermott, of Fibreboard's liability and the jury determines that Fibreboard was 50 percent liable. What's the result? What's the net result to this plaintiff? What's he going to get out of the tort action? Substantially less in a pro rata than pro tanto analysis. Correct?

A. I don't understand what any of this has to do with McDermott. Whatever the state law is, it is. Ahearn doesn't change that. If McDermott applies, it applies whether we're in Ahearn or whether you're not. And I don't think it makes any difference.

Q. Well, let's just do it this way. Generally speaking, leaving McDermott out and dealing just simply with the states, you do acknowledge that there's a difference in treatment in a pro rata jurisdiction than a pro tanto jurisdiction, under the types of scenarios we've been talking about?

A. The treatment of what, settlements?

Q. Treatment of verdicts as there's been a settlement with a defendant prior.

A. I agree that the impact of a settlement with one defendant varies from state to state depending on how that state treats settlements for purposes of offsets against judgments.

Q. Okay. Was there any effort made by class counsel to analyze that issue or deal with that issue in the simple fact that people were going to have different results depending on which type of analysis was performed down the line, pro rata or pro tanto?

A. Yes.

Q. And what was done?

A. What was done was to carefully look at the law of various jurisdictions and to conclude that the fairest treatment here not only for the class but for the third-party class was to preserve everybody's rights under state law under the tort system intact in this settlement. And that is the purpose of the codefendant provisions and that's what happens. In other words, whether Ahearn existed or not, the concerns that you're raising are not impacted.

Testimony of Steven Kazan, class counsel Tr. 1030-1031:

A. Specifically, I don't recall. I know that at least Mr. Cox and Mr. Lockwood have spoken to them. I can't tell you when.

Q. They told me when, and that was in September. Do you have any recollection of anytime prior --

A. Excuse me.

Q. I'm sorry. I apologize, Mr. Kazan.

A. Thank you.
Q. While you were negotiating this settlement, up to the time where you reached an agreement as it was reported in open court on August 27th, to your knowledge, did any member of the plaintiffs' negotiating team talk to or consult in any way with any of the people who are now the class representatives in this case?
A. I'm not aware of whether they did or not.
Q. You certainly did not?
A. I did not.
Q. Okay. Mr. Kazan, in the history of asbestos litigation from day one till today, have you ever been advised by anyone that there has been a recovery of punitive damages in a medical monitoring claim?
A. I'm not aware of any in the asbestos context, but I can't tell you that I'm aware of any cases having gone to trial on that theory.
Q. Okay. In the history of tort litigation anywhere, anyplace, can you, Steve Kazan, ever point to a recovery of punitive damages in any medical monitoring case for any reason, anywhere?
A. If by medical monitoring you mean --
Q. Only.
A. Only? No other physical --
Q. No other physical --
A. I'm not aware of any.
Q. Mr. Kazan, I think I heard you testify that even after August 27th you continued to file cases in court against Fibreboard, is that right, for your clients?
A. Well, yes, that's -- that's not exactly a correct statement. You're implying forever after --
Q. No, not forever after. I'm just talking about after is the word I used. After August 27th, 1993, you continued to file lawsuits for your clients against Fibreboard. Right?
A. Sure
MR. BARON: Thank you.
THE WITNESS: Would you like me to tell you why?

MR. WACHTELL: If you don't ask, I will.

Testimony of Steven Kazan, class counsel Tr. 1037-1042:

started, if somebody dies, you preserve their rights to pain and suffering, under California law, which otherwise would die with them. And I have had cases where that has been a major factor, has been worth hundreds of thousands of dollars to people already in this exigent health program. So I think they're going to get at least as much money even gross, with one footnote. Recovery under Ahearn, as they would under the tort system, the trilateral or normal tort system, they're going to get it quicker. In fact, they're going to do better, because the attorneys' fees are lower and the transactional costs are lower and money costs are lower. Typically, I'll give you a ballpark and say we run three to five percent of the total expense in out-of-pocket reimbursement, expenses, and trials obviously can be much more expensive than that. It's not unusual for us to spend fifty or a hundred thousand dollars out-of-pocket on trial. So I mean all around I think that these people are better off under this deal.
Q. Even though under the global they are capped at $500,000 and cannot recover punitive damages nor interests.
A. Part of that was the footnote that I mentioned as I was going through that answer. Punitive damages -- to the extent Fibreboard is at risk, and that has been a factor in the settlement of their cases, that is captured in the historical data and averages that we all have, which is to say if they've been afraid of me or Mr. Baron or anybody else, that we're going to get them for punitives, and they have subconsciously paid a premium on that for that extra risk, then it's in the data and it's in the historic averages. The giving up of punitive damages I think is not a big issue, because almost no one has gotten it. And when they've gotten it, they've typically resolved it anyway. Speaking for myself, we had a punitive damage verdict in three cases. It went up on appeal. We

settled. You know, my clients were happier to have money than to sit around for five years waiting for a court of appeal. So I don't think it's a major factor. And in negotiation, by definition, there are things that everybody gives up to make a deal or a system work. I don't think that was a big issue for us to eliminate. I just don't think it was an important factor.

Q. Under the trilateral settlement, might not a very severely injured claimant, someone with mesothelioma, recover more money than under the global agreement.

A. Can I answer that from the perspective of my individual clients --

Q. Yes.

A -- in California? I suppose the first few who get to the courthouse before the mass consolidations that we talked about might, in theory, do better. I think Fibreboard will very vigorously defend any punitive damages claims, certainly. I don't want to speculate on the potential for actually recovering that, although I goes I'd like to think that if anybody is gonna get it, you know, I'll be one of them. But there is a potential in our area for verdicts against Fibreboard to be higher than $500,000 that's largely in the context of a couple of work sites that are largely World War II where Fibreboard was essentially all the insulation parts and labor, if you will. By definition those people are getting on in years and so they're not going to be $10 million cases. My experience under the assignment program and before that with Fibreboard is that we have had the occasional case that has settled in excess of $500,000. I was trying to figure out how many of the dozen that Mr. Snyder mentioned were mine. And my best estimate is probably somewhere between six and nine. But I just don't know offhand. I can probably think of at least five. When I look at those in terms of net to the client, virtually all of them would have done better with $500,000 under the trust than the six or six fifty or seven hundred that we got in settlement. Maybe by the time you get above 750,000, considering the fee differential and costs and so on, there might be, you know a few thousand dollars

swing. But I think that's a small thing to give up. And I'm confident that any client I have would make that same trade if they come in later on and they were presented with the alternatives. The decision would be: Better take the Ahearn deal at $500,000 than the -- everything that goes along with pursuing it in the hopes of getting a 700, 750, 800 thousand dollar settlement.

Q. You may have answered this question, but let me ask you this. As of August 27th, 1993, or today, granting the possibility that there might be some severely-injured victims who even after adjusting for the attorneys' fee differential, may net out more under the trilateral than under the global, why, in your view, is the global settlement fair, reasonable and adequate?

A. Well, as we did the global, looking at the interests of the future victims, basically -- and putting aside the case I might have filed August 30th as a member of the class who may have been diagnosed on August 1st, but looking long-term, the overwhelming majority of the class members have a history of exposure or they wouldn't get a disease that would later make them class members. They may or may not know about the exposure even, but they certainly don't know of any disease. And in effect, you know, all of them are saying, you know, "I'm willing to make this deal or these lawyers are telling me that it's a good idea to make this deal, and if I'm the one in a million who might have made $10,000 more or whatever more money later on, if the deal had been different, I might suffer from that. But on the other hand, the odds are much more likely that I'll be one of those who are going to net just as much, if not more, under this system, and the benefits and the protections that I get for all the reasons we've talked about, insurance risk and what Mr. Wachtell raised about the coverage issues and so on, you know, it's a rational -- indeed, the only rational decision. If you're asking me, you know, will you do better if you get to bet on horse races after they're over, the answer is sure. But nobody gets that choice.

Q. Are you saying then that as of August 27th and indeed as of today to a considerable extent the members of the class of fu-

ture claimants really don't know whether they'll be a severely-injured claimant or not, whether they'll be the one who if they were in the tort system might recover in excess of $500,000, and that therefore behind this veil of ignorance as of today the choice is better for the global settlement?

A. I think so. Well, you know, I'm sure that that's the case. And, you know, that's part of obviously what was on our minds as we did this. I mean, I personally took very seriously the obligation to act for clients, you know, who don't know that they're going to be somebody's clients later on. You know, I've had only 20 years of experience in asbestos of clients saying to me, when I explain all their options, invariably the response is: Mr. Kazan, you're the lawyer, you're the expert, I came to you because people say you know what you're doing. What should I do? And I tell them what I think, you know. So this is not like a new responsibility. It's something that we take very .....

Testimony of Steven Kazan, class counsel Tr. 1046-1047

And I think at some point they and CNA will likely agree that the smart thing to do, you know, is some kind of Chapter proceeding.

Q. Under the global settlement, pre-'59s and post-'59s are treated equally as far as availability of funds. In other words, there's no distinction anymore based on the insurance coverage situation?

A. That's correct.

Q. That might mean that post-'59 exposure will receive relatively more under the settlement agreement vis-a-vis pre-'59s than they did prior to the settlement agreement. Is that correct?

A. Well, under the assignment programs there was a disparity or discrepancy between how those two groups were treated. I think Mr. Snyder said that the April 9th agreement sort of removed that. And what we've done, essentially here, I think, is create a situation where each case gets resolved on its merits

without as you indicate, any artificial impact of the question of whether it would or would not have been covered under one of these policies, assuming these policies covered Fibreboard.

Q. What I want to ask you now, this is my final area, is there any unfairness, then, in the global settlement agreement due to the fact that you might be taking from Peter to pay Paul? In other words, taking from the pre-'59s in order to pay more to the post-'59s than before the settlement agreement?

A. Well, I don't think we do that. I think we take from CNA and Pacific Indemnity to pay Peter and Paul, and we've paid them both fairly and reasonably. And so if Peter is getting what he would have gotten in the tort system in a fair value for his case. I don't think he can or would or should object, you know, that Paul is also getting treated fairly.

PROFESSOR GREEN: No further questions.

THE COURT: Mr. Coleman.

MR. COLEMAN: Thank you, Your Honor.

Testimony of Joseph Cox, class counsel Tr. 1162-1165

those post-'59 cases satisfactorily even with the insurance coverage in place to cover pre-'59.

THE COURT: So then I gather you agree that there's a substantial risk of Fibreboard's bankruptcy even if they won the coverage litigation.

THE WITNESS: Your Honor, the uniqueness of this deal is that in my view the global is the only way that claimants can be paid -- all claimants can be paid a fair sum of money and Fibreboard can survive.

THE COURT: Okay. Now one last question. Do you agree from your legal analysis that there at least is a substantial risk that the mechanism used by way of the assignment procedure that was used places coverage for those cases at risk and at least that question would have to be litigated?

THE WITNESS: Are you saying because of the Andres opinion, would the assignment deals be at risk?

THE COURT: No.

THE WITNESS: I don't understand.

THE COURT: Would Continental have a legitimate legal basis to come in and say, "You have voided the potential coverage or violated the contract by entering into this assignment mechanism, and even though we lost the coverage case we don't owe insurance monies for those cases that participated in the assignment program"?

MR. RICE: Your Honor, excuse me if I may, but on behalf of our firm, we would object to that question and ask Mr. Cox not be required to give a legal opinion, because we may find ourselves in the position of litigating that issue and I would just as soon not be on record as to what our position would be.

THE WITNESS: I think I can answer that without giving a position.

[Laughter]

MR. WACHTELL: To be on record of what Continental's position would be, Your Honor's question was too mild. We would not only question the validity -- the obligation of insurance on the assignments, we would question any obligation of insurance.

THE WITNESS: Your Honor, I can answer the question.

THE COURT: All right. Go ahead.

THE WITNESS: I'm certainly not going to put us in a position, as Mr. Rice is concerned -- and he is well concerned -- Mr. Wachtell raised that issue yesterday in one of his questions. Certainly it is an issue. But let me say this about that, that issue. There's been a lot of discussion about whether or not Fibreboard has contributed anything to this settlement other than the $10 million. From the time in 1988 that they started this assignment -- the 40/60 program, and going through the assignment program to get CNA to the table, they put that company on the line. That company was on the line then, they ran up debts against their assets substantially higher than they were on that particular maneuver, it got CNA to the table.

On April 9, they had that leverage, they gave up all that leverage in exchange for a promise that CNA would try to negotiate a global, and again they put their company on the line.

And then when they entered into the global settlement agreement, and we insisted on a trilateral backup, there's no assurance that that global will go down, so that company is still on the line.

So if there's any question about whether Fibreboard put their company on the line or not, I don't think that that -- you know, the fact that their assets -- and one of the things that they did was pursue this assignment deal. And if Mr. Wachtell chooses to raise that issue, it's a situation that I suppose legally puts Fibreboard again in the position of putting their company on the line.

THE COURT: But that's really not my question. My question is: Is it a legitimate factor for this court to consider in

determining the fairness of the trust arrangement that a potential litigation exists over the validity of the assignment mechanism as it relates to whether it voided or affected coverage?

THE WITNESS: I think that is an issue the court has to consider, yes, sir.

THE COURT: Mr. Inselbuch, why do I need to hear anything else from Joe Cox?

MR. INSELBUCH: I just have one other very brief area, Your Honor, then I think we'll be done.

Q. You've heard a lot of testimony about an exhibit called Abbott 1, have you not?

A. I certainly have.

Q. Now, Mr. Roach, who is the president of Fibreboard, states in his financials that he files

Testimony of Joseph Cox, class counsel Tr. 1183-1184

certainly we made the determination and conveyed it very clearly that under no circumstances were we going to enter into a global settlement with a (b)(1)(B) with Continental and Pacific unless that backup trilateral was present. Because we wanted to make sure the money was there.

THE COURT: So at that point then we had two apparently inflexible positions. Your side said there was not going to be any global without a trilateral; Continental says there's not going to be a global unless it's a (b)(1)(B) so they can get out of the asbestos business. Right?

THE WITNESS: I think that's correct.

MR. WACHTELL:

Q. Continental was not saying that if there should be an agreement that it had -- it was adverse to the concept of a trilateral, though, was it?

A. [Pausing]

Q. Or bilateral, as it was then phrased.

A. I don't think -- my recollection is that there was some concern on Fibreboard's part about a trilateral or bilateral. I don't think CNA was particularly concerned. I guess as long as they could get themselves out of responsibility under the bilateral, they didn't care how it was done.

Q. You understood that Fibreboard had a real problem on it, because then they were coming up with a finite sum of money which would have to cover all claims, and if it didn't they would be in real trouble; is that right?

A. That's exactly right. And that's what I said a minute ago. By agreeing to do that, they once again put their company on the line.

Q. Going back to the state of play in July, where you have an understanding as to Ness Motley, and on August when it's signed, Ness Motley 2, as of those dates, did you understand that it was Continental's position that no matter what the negotiations were

on price or terms or the like that it was not prepared to enter into either the global or a backup bilateral without acceptable participation by Pacific?

A. Yes. In fact, that had been a sticking point at one time in Ness Motley agreement, which we got over; but, yes, it was true that acceptable participation by Pacific had to be done. And that was -- that was something that was not resolved until very late, because Pacific participation was not resolved until we went to Philadelphia on August 22-23 time period. And that participation was a sticking point for the negotiating counsel, because

Testimony of Joseph Cox, class counsel Tr. 1225

A. [Pausing]

Q. Right?

A. Well, it's -- I know that the Ness Motley agreement provided for the possibility for it rolling into the global. When we -- and that's consistent, because when we negotiated Ness Motley, Mr. Baron, and as I've said before, we had a lot of cases, and what we were doing in Ness Motley was going to have some implications, particularly as a price term, on any global discussions we had. And to the extent that we were negotiating Ness Motley and representing our present clients and exercising our fiduciary obligation to our future clients, we knew that was the case. And so we had an extra obligation to make sure that, knowing where CNA was coming from, that we reached a number in Ness Motley that would be fair to Ness Motley and that would -- when the global came down, would not adversely affect future clients as well.

Q. Mr. Cox, I think you've testified over and over and over in this court that there was a time, particularly in July, where you were still attempting to negotiate a presents and futures global deal. Right?

A. Correct.

Testimony of Joseph Cox, class counsel Tr. 1238

Q. All right.

A. The Ness Motley agreement.

Q. Whatever. In early August?

A. Right.

Q. I'd like to compare that in a sense with the global agreement that was reached in Ahearn. And what I would like to do first, I believe you testified on direct examination that under the Ness Motley agreement, the August 1993 Ness Motley agreement, a pre-1959 claimant could expect to receive on average $13,000?

A. Let us be careful when we go down this road.

Q. I'm going to get into how it's structured, but --

A. The average payment for all pre-59s under that deal was $13,000, 50 percent of which --

Q. Right.

A. -- was in cash and 50 percent subject to risk.

Q. Okay. We'll get into that in a minute.

Now, under the global agreement that was reached, Mr. Wartnick in his deposition and Mr. Snyder in his deposition opined that the average value of a case that would come to fruition under the Ahearn agreement would be somewhere between seven and eight thousand dollars.

Testimony of Joseph Cox, class counsel Tr. 1242-1256

MR. BARON: Thank you. Boy, it's tough.

Q. I want you to assume this average person. Am I correct in understanding from your prior testimony that this average person under the ness Motley agreement would receive, on average, about $13,000 as it becomes structured under the Ness Motley agreement?

MR. WACHTELL: The average person is presumably a blend of a pre- and post-'59. So I think the question is mistaken.

MR. INSELBUCH: Same objection.

THE COURT: I'll permit the witness --

MR. BARON:

Q. What does the average pre-'59 person receive under the Ness Motley agreement? What's the number?

MR. RICE: He has asked two questions that are entirely --

THE COURT: I understand. I understand. Answer what you can answer.

MR. BARON:

Q. What does an average pre-'59 claimant receive?

THE COURT: I thought we were through with the question.

MR. BARON: I want to be sure it was clear.

[Laughter]

MR. BARON: For the first time.

A. Mr. Baron, let me give you an explanation. And that might help you in framing your question.

MR. BARON: Thank you.

A. The Ness Motley agreement is initially negotiated was negotiated on an average of $13,000 per case for pre-'59 cases. That $13,000 contained an element of cash and an element of risk. The element of cash was 50 percent of that, or $6500.

Q. Correct.

A. If you -- that's for that example, for an average. However, the initial contemplation was that the numbers for that 13,000 average would be put on the point system and allocated across decade lines and across disease lines. So, therefore, each individual, depending upon the points, would get a different number.

At the end of the negotiations, CNA requested that instead of working off a $13,000 average that we work off a disease mix. And I think I testified to that yesterday. That disease mix represented the total money that those people would get if they had a $13,000 average.

Now, also in the deal there is a provision that on that disease mix there can be reallocation of those funds. So the same result that would have occurred under the point system, that is, the distribution of the 13,000, could occur under the terms of the agreement with respect to the mesothelioma cases, the asbestosis cases and so on with respect to pre-'59, but still they were subject to the risk, 50 percent of the money is subject to the risk.

Now, if that's all those people ever get, then that's all they ever get. And they would have gotten substantially less than the average settlement value historically of Fibreboard.

If they get all of it, having taken the risk, then they would have had the benefit of that risk.

Now, certainly if CNA had paid us a full cash value, there would have been another discount involved. In other words, if they had paid us full amount, I think Mr. Snyder estimated it at 15 to 20 to 25 percent, so that would lower your 13,000 number for full cash value. but the average for the Ahearn class that you talked about is a blended average, and the lowest blended average in Ahearn is $7500 under the Nicholson proviso.

If you take the Ness Motley blended average at 75/25, which is close to what it was, you get about 10,340 bucks or so. And if you reduce that for attorneys's fees and the costs, Mr. Baron, the net to client is still going to be about equal in Ahearn to what those Ness Motley people would get. So it's not as easy or as simple as you would try to make it out.

Q. All right.

A. The bottom line is that an Ahearn client is going to get just about the same thing net to client that a Ness Motley client under this Ness Motley deal for present will get.

MR. BARON: Your Honor, if I might, I'd like to test him on that, and I'd like to ask him specific questions on that particular issue.

Q. Listen carefully so that we can try to get through this quickly. Under the Ness Motley agreement, the pre-'59 average --

or the pre-'59 price average of 13,000 that you described is half in cash and half in a note of some sort. Right?

A. Well, half is subject to the contingencies that are described in the agreement, and that is a -- and you know what they are.

Q. I do.

A. It's the approval -- yeah.

Q. the contingencies are whether: 1, a global is done; 2, what was then called a bilateral, now called a trilateral agreement is done; 3, a win on the insurance case; and the fourth, which is the bad contingency, is a lose or a loss on the insurance case. Right?

A. That's correct.

Q. Okay. So the other half of the proverbial $13,000 gets paid only if there is a global, there is a trilateral or there is a win on the insurance, and it doesn't get paid only if there's a loss on the insurance. Correct?

A. Yeah, I think that's probably true.

Q. All right. And that half that doesn't get paid until something happens here draws interest, does it not?

MR. WACHTELL: I object to the form of the question. It doesn't get paid unless something happens.

MR. BARON:

Q. The contingent half, the 6500 that is the note, that note or whatever it is, whatever that instrument is that you agreed on, draws interest and will be paid interest if one of the -- if one of the four things that are the three good ones happens?

A. And there are provisions -- you're right. And there are provisions in the agreement for how that interest is going to be utilized.

Q. Okay. Now let's talk about the risk that was then extant with the Ness Motley claimants. First of all, you have a fiduciary obligation to those Ness Motley clients, and did on August the 5th, when you entered into this agreement, did you not?

A. Well, you have to break that down in two parts. With respect to the present claimants, we had a direct -- either a direct contractual attorney-client relationship with them or we had a relationship with our cocounsel who had a direct attorney-client relationship with the present cases. And we had a fiduciary relationship to future cases, future claimants.

Q. All right. Well, in terms of future cases that could come into the Ness Motley agreement that was entered into on August the 5th, that window ended on August the 17th, did it not, by agreement?

A. Run that by me again.

Q. Okay. In terms of the cases that could be presented for payment under the Ness Motley agreement that was entered into on August the 5th, there was a window that permitted any case to be presented to either Fibreboard or Continental, or whoever it was, up till August the 17th?

A. I don't recall exactly what the document says. I do recall an August 17 date for submitting claim forms, but I believe the language had something to do with subject 2 settlement. I just don't recall that specifically.

Q. Okay. But there was a cutoff date, was there not?

A. Yes.

Q. Where you couldn't submit any more claims?

MR. SNYDER: Objection. If he's referring to futures, there was no cutoff and that's misleading.

MR. BARON:

Q. No. Presents.

A. You are referring to presents? Yes, there's a date in there that deals with present cutoffs, yes.

Q. And after that date everything was to be considered a future as far as the handling under either Ness Motley or a global. Right?

A. Well, in the Ness Motley agreement everything after August 17 submission date would be considered a future under the Ness Motley futures agreement.

Q. Okay. now, on August the 18th, did you fell like you had a fiduciary obligation to those people who had participated in the Ness Motley agreement and whose $6500 on average was in a contingent state?

A. I had a fiduciary obligation to the futures that -- the future potential claimants of clients of Ness Motley who would claim under the Ness Motley agreement, yes, I did.

Q. And was it your obligation as a lawyer to do whatever you could to assure that that other 50 cents on the dollar was paid?

A. For those future claimants?

Q. For those people that were covered under the Ness Motley agreement.

A. Well, I had an existing obligation to the present claimants to try to obtain for them the risk portion of their payment, yes.

Q. Okay.

Now, as to the future claimants that you were representing, or a least had a fiduciary obligation to after you had been negotiating for them for a while, you had an obligation to them, did you not, to assure that the amount of money that they received was adequate?

A. I had an obligation as a fiduciary to the future claimants to obtain the best deal that I could and the fairest deal that I could for them, yes.

Q. And did you have an obligation to reject offers that you felt were inadequate?

A. Well, I think as the plaintiffs' attorney, we always object to offers that we consider inadequate; and we did so on a number of occasions in a number of settings. But what I's telling you here to what you're getting at is that a future claimant under the Ness Motley agreement and a future claimant under Ahearn will fare the same, Mr. Baron.

Q. What about a present claimant under Ness Motley as opposed to a future claimant under Ahearn That's the interest I'm concerned with.

A. I think I went through that structure for you just a second ago.

Q. You did. And on August the 18th, you had a fiduciary obligation to the presents under Ness Motley to see if you could get their other 50 cents on the dollar, yet you had a fiduciary obligation to the futures to assure that the number was an adequate number. Do you see any conflict between those two positions at all, Mr. Cox?

A. Mr. Baron, anytime you represent more than one claimant, such as you've described in my situation, there is a potential for conflict -- there was a potential conflict, I will guarantee with you that there was a potential for conflict in the negotiations that we were conducting, but there wasn't any conflict. And even if there had been one, it did not, as I have just described to you, affect the outcome. The people are going to be treated the same in terms of net to client. There may be a variation on a case-by-case basis, true, based upon evaluation of cases, but on average they're going to be treated the same. And I might add substantially better than they were treated under the historical settlement averages of Fibreboard.

Q. Now, under the Ness Motley agreement, again back to this average claimant who gets on average 6500 in cash and a 6500 note that draws interest, the only way that that claimant would not get the second 6500 is if there was a total loss on the insurance coverage. Right?

A. I don't know that I can answer that, because I don't know --

Q. Can you think of any other way that they wouldn't get their 6500 absent a total loss on the insurance?

A. Well, I mean what I'm saying -- what I'm having a problem is, I don't know what a partial loss on the insurance coverage would do. I really don't know the answer to that. I mean, if there was a complete loss -- if there was no global and if there was no trilateral and there was a complete loss of the insurance coverage, those people would not get any more than they've already gotten.

And that is the risk that they assumed in order to take the -- instead of getting an additional cash piece, they got a little more than an additional cash piece, but it wasn't real.

Q. Okay.

A. It's contingent.

Q. It's contingent. Now, if they didn't like their average settlement that was being offered to them under the Ness Motley deal and they weren't members of the class, they could just say no and go back into the tort system. Right?

A. The members of what, do you mean the Ahearn --

Q. No, your present clients.

A. You mean the futures piece? They could opt out of the futures piece?

Q. No.

A. They can opt out of the futures piece if that's in place.

Q. Mr. Cox, listen. If we're talking about a present client who had his claim liquidated under Ness Motley, if that present client, the average client, didn't like his $13,000 half cash, half the structure, that client had the absolute right to opt out of that deal and go back into the tort system?

A. That's right. There were individuals who had the right to opt out, and there comes in the -- the -- the interest piece. Because, as I said before, Mr. Baron, and I don't think there's disagreement anywhere, this was a good deal. And --

Q. Okay. It was a great deal. Because --

A. We haven't had anybody that's opted out of the tort system, let me put it that way.

Q. But they had the right to opt out and if they opted out they could seek punitive damages, they could go after joint and several liability, they could get prejudgment and postjudgment interest. Right?

A. [Pausing]

Q. Right?

MR. RICE: Your Honor, I object. It's an incomplete hypothetical.

MR. BARON: Assuming they won.

MR. RICE: Excuse me. Whether Fibreboard is in existence or not --

THE COURT: I understand.

MR. BARON: I understand. We can speed this up.

A. Well, taking the hypothetical in your best light, I suppose that a present Ness Motley claimant could opt out and go into the tort system and sue Fibreboard.

MR. BARON:

Q. Okay.

A. But they didn't.

Q. Okay. Now, if someone had come into your office 20 days later, August the 30th, and it was, the identical person, he just happened to miss his bus and he showed up at your office 20 days later, same fellow, and he now is claiming under the Ahearn agreement as of August 30th, first of all, he would expect that Mr. Average would be liquidated somewhere in the range seven, eight thousand dollars. Right? Same pre-'59, same individual?

A. Who are you talking about now? What are you -- I don't understand what you're --

MR. INSELBUCH: Objection, Your Honor. He's mixed up now the seven to eight thousand, made that pre-'59. And that's not the witness's testimony.

THE COURT: Do you want to run at it again, counsel?

MR. BARON:

Q. Same individual who was a present Ness Motley client, Mr. Average, pre-'59, and he shows up 20 days later, he could expect to receive somewhere around $7500 under Ahearn. Correct?

A. That's not -- that's not necessarily true, Mr. Baron. Under Ahearn, each individual is evaluated according to the historical averages, so on. You cannot compare what somebody is going to get in that process under Ahearn as an individual to what that

person would get under -- under the Ness Motley agreement. As I said before, the average person under Ahearn, all factors considered, the net to client is not going to fare any worse than the net to client Ness Motley deal.

Q. But they're certainly treated differently. Right?

A. They are certainly not. We treated everybody fairly, and there is nowhere in there that you can find a conflict or a differential.

Q. All right. Now, the person claiming under the global agreement will receive no cash at all until his claim is liquidated. And the guy that comes in on August 30th is going to have to wait until this deal is approved. Right?

Steve Snyder is shaking his head yes.

A. I think that's probably true because a claimant that gets paid today is going to get paid more than a claimant that comes in next year. But that's no different than normal in the tort system.

Q. All right. The same fellow who had come in on August 10th that could get cash under the Ness Motley deal is now going to have to wait until this deal is approved, assuming that it is approved. Correct?

A. I could say it would be approved a lot faster, but --

Q. Yeah, I understand that. But the bottom line is that they're going to have to wait till there's final approval?

A. Anyone in the Ahearn class is going to have to wait until final approval before they get paid, yes, that's true.

Q. They won't get 50 cents on the dollar while they wait. Right?

<u>Testimony of Joseph Cox, class counsel Tr. 1268-1270</u>:

proceeding.

Q. Well, the question was: Did you communicate with them or attempt to involve them in the process when you were negotiating this deal? That's the question.

A. I didn't personally ask Mr. Safchuck to come in and negotiate with us, no, sir.

Q. Okay. Did you ask for anyone's input from any of those groups while you were negotiating, to your knowledge?

A. Well, we've asked for input from a lot of different sources on this thing. I mean, I don't know that that was one of them. I -- you know, Mr. Kazan had contact with them. You might want to -- you might should have asked him about that.

[Laughter]

MR. BARON:

Q. Mr. Cox, I asked you in your deposition what would have happened if you had gone to Mr. Ahearn after August 27th and he would have said no, it's a lousy deal. Do you recall --

A. Yeah, I remember you saying that. Yeah, if once we had discussed and laid out all the stuff in front of him and he said, "I don't want to do this"?

Q. Year. What would you have done?

A. With respect to Mr. Ahearn, I would have wanted to know why and I would have asked him why. Because it would have given me some concern that he would have said that. And if he had said that, then I probably would have gone back to my people and told them why he said that, and we would have considered what he was saying.

Q. Well, do you remember--

A. But he didn't say that.

Q. Yeah.

A. And in addition, we would have probably, after considering what Mr. Ahearn said, tried to correct it or we would have gotten somebody else probably.

Q. That's what you told me when I asked you last time.

A. That's exactly right. We probably would have.

Q. Okay. So if he wouldn't have agreed to it, you probably would have gone and found somebody else?

A. Well, subject to his concerns. We have an obligation to Mr. Ahearn as our client. If ye had a concern, we would have

treated that concern seriously and we would have done something about it.

Q. Okay. By the way, Mr. Cox, have you ever filed a claim for an asbestos victims for medical monitoring?

A. Have I?

Q. Yes.

A. No.

Q. Do you know of anyone in your firm that has? Any of your partners, associates, anybody?

A. We have 53 lawyers. And I don't see half of them most of the time. So I don't really know -- unfortunately, I don't know what somebody does from one day to the next. But I can't answer that question. I don't know whether they have or not.

Q. Never come to your attention that anyone from Ness Motley has ever filed a claim for medical monitoring, is that right?

A. I -- I just can't recall.

Q. I see.

A. It's possible, but I don't recall.

Q. Mr. Cox, is it your practice generally to file claims for damage against asbestos companies for individuals who do not have an asbestos-related disease? Do you do that from time to time?

A. Do I do what?

Q. Knowingly?

A. Do I do what?

Q. Do you file claims for people who have no present disease, from time to time, knowingly?

Testimony of Joseph Cox, class counsel Tr. 1296-1298

stick with CNA.

Q. With regards to Mr. Jaques' cases, which you knew there was some number of them, whatever the number happened to be of them out there, did it ever occur to you or anyone else negotiating this deal that those people had retainer agreements, contracts with Mr. Jaques calling for representation in return for a one-third contingency fee?

A. I can probably tell you I knew nothing about Mr. Jaques' cases or what his relationships were with his clients. I had never had any meetings with Mr. Jaques, I never had any discussions with Mr Jaques or anyone in his firm about his cases, I knew nothing about his cases or the value of his cases or the lack of value. I knew absolutely zip.

Q. I understand that. But did it ever occur to you that there may be contingency-fee agreements out there that you were in effect impinging on by pursuing this class action settlement?

A. I -- I -- I don't believe that I impinged on anybody's contingency-fee agreements at all.

Q. Let's do it this way. What would Mr. Jaques get as far as a contingency fee if he ran his clients through the settlement, global settlement?

A. Through the Ahearn global settlement?

Q. Through the Ahearn global settlement, the 25 percent maximum, correct.

A. I think that the Ahearn global settlement provides that there is a 25 percent cap on attorneys' fees, in order to ensure that the client victim receives the maximum amount of money possible.

Q. I understand. Would you agree with me that generally speaking, not referring directly to Ahearn, but a future class typically would be all those people who had not manifested disease? That would be one possible definition for a futures. Correct?

A. I mean I -- you could decline the class any way you want to, if you want to. The class that's here is defined by all cases that haven't been filed as of a certain date.

Q. Here's my point. With regards to people who had not contracted disease and therefore had not retained counsel -- well, let's just -- let's break it down this way so we don't get bogged down.

With regards to those futures who had not retained counsel, there would be no fee issue, as I've just raised, with regards to those people. Correct? Because they hadn't retained counsel, therefore, there would be no contingency-fee contract?

THE COURT: Mr. Clark, I think it's fair to say that this proposed settlement may get disapproved for any number of reasons. That does not include the fact that claimants might save attorneys' fees.

MR. CLARK: Your Honor --

[Laughter]

MR. CLARK: Your Honor, I'll move to the next point. My point is really this --

THE COURT: I understand your point. You say Mr. Jaques had a contract with his clients, and to the extent of the difference between what they would get under Ahearn and what he would get in the event those cases got settled or tried to judgment, there's a differential there. And you're exactly right about that.

MR. CLARK: Right. And that there would be an interference with contract.

Q. Did anyone ever consider that issue, at any time, to your knowledge?

A. Interference with a contract?

Q. Interference with a contract.

A. You know, we considered a lot of things --

[Laughter]

A. I'm not sure that -- I'm not sure that that's

agreement.

Q. Those agreements were not principally negotiated by Continental, is that correct?

A. That's correct.

Q. Now, would you -- at the time when our firm was called in on this in February, when you started to become involved, just to -- we've heard Mr. Snyder's testimony as to what he was trying to do, and I'm going to essentially ask you whether the reciprocal was -- what the situation was facing Continental. Is it correct that you had had this massive assignment program where tens of thousands of cases had been reported to be settled by Fibreboard essentially using Continental's money and without Continental's consent?

A. Yes, there was such a massive assignment program.

Q. And is it correct that based on what we were advised by those who had been long involved in the situation that the values on these settlements had been very much escalating?

A. Yes, that's correct.

Q. And is it correct that it was Continental's belief that Fibreboard had no incentive to keep the values down and to the contrary had a considerable incentive to see them go up in order to pressure Continental?

A. That was also our belief.

Q. And was it also Continental's belief that Fibreboard was loading settlement values onto the pre-'59s and lightening up on the post-'59s?

A. I certainly believed that and believe it now.

Q. Is it correct that the judicial decisions which had been rendered were not going particularly well for Continental, that Continental had lost its punitive damage case in the Ninth Circuit, Continental had lost the Andres assignment case on the right to assign in the trial court in California?

A. That's also correct.

Q. Now, we did understand that that was not a res judicate procedure, is that correct, in the California procedure?

A. That's right.

Q. And was it also the case that Continental had attempted to take a writ of mandate and get an immediate review of that Andres decision from the California court of appeal and had failed in that attempt?

A. I believe that's what I was advised at the time.

Q. And as has been testified by all the witnesses, Continental was then faced with the lawsuit brought against it by Fibreboard in this court, by Fibreboard with the plaintiffs allied with Fibreboard who were representing to the court in substance that they had been successful in achieving a settlement of tens of thousands of asbestos cases and that all that was needed to finalize that settlement was for the court to agree with the Andres court that such assignments were indeed valid, that the amounts were reasonable and that it was appropriate to put -- to issue a bar order of contribution against Pacific? Is that correct?

A. I believe it to be correct. It was about 20,000 cases at the time.

Q. With the provision for more being added?

A. Well, more were added over time.

Q. And this, as you understood, was a court which had considerable familiarity with the asbestos cases and in Camino had seen values far higher than the values that were in the Ness Motley 1 agreement; is that correct?

A. That was my understanding.

Q. So would it be fair to say that one could not be wildly sanguine about the potential outcome of that litigation on behalf of Continental at least?

A. We were not specially optimistic.

Q. And in the coverage case as it then stood in California, is it correct Continental had pretty much struck out at the trial court level?

A. That would be a fair characterization.

Q. And we did understand that there were substantial arguments available on appeal, but there was certainly no assurance of obtaining a reversal; is that correct?

A. That's correct.

Q. And is it further the case that if there were a loss in the California court of appeal that under California procedure there was no right to review by the California Supreme Court, it was purely discretionary?

A. That's also correct.

Q. Now, the converse was true as well. If there was a win in the California court of appeal, that might well be the final decision in Continental's favor; is that correct?

A. That's correct.

Q. Now, did we then learn or did Continental then learn -- I'm not limiting my question to the law firm -- was Continental then apprised that Fibreboard was proposing to enter into a multi-billion-dollar global by way of assignment of all of its cases, class action, presents, futures with the plaintiffs?

A. Yes.

Q. And assuming that the assignments were valid, assuming there was a loss of the coverage case, then were that to happen Continental would have been forced to write checks for billions of dollars under an agreement as to which it had had no say on the terms and was facing the prospect of not being able to get even contribution from Pacific in that situation; is that correct?

A. That's true except that we had no way of knowing at the time what the ultimate cost of that agreement would be to Continental, because the settlement was not for an absolutely fixed amount with respect to the pre-'59 cases.

Q. Eventually we got a draft of the settlement. Continental was furnished a draft of what was purported to be the final or very close to the final form of a global settlement agreement; is that correct?

A. It is.

Q. And there was an original going-in amount for that settlement. Do you recall what it was?
A. I don't off the top of my head.
Q. It was in the billions.
A. It was -- for pre-'59 cases, it was somewhere around $2 billion.
Q. And then there were opt-out provisions which could cost more, is that correct?
A. That's correct. It was not a closed-end deal.
Q. And there were provisions for extra funds for third-party claims and the like and the like and the like; is that correct?
A. That's also correct.
Q. Now, did this situation indeed, to use Mr. Snyder's phrase, get the attention of Continental?
A. It had -- when -- when I first got involved, it clearly had the attention of Continental's senior management.
Q. And was a decision made by Continental at that time to see whether it was possible to achieve a global resolution of its entire-Fibreboard problem?
A. Yes, that is the decision that Continental made.
Q. And is that the decision that was then publicly announced along with an announcement of a decision to add $1.5 billion to Continental's reserves principally to recognize the seriousness of the situation that had developed with respect to its Fibreboard exposure?
A. Yes
MR. WACHTELL: And that, Your Honor, that announcement, is Fibreboard exhibit 552 in evidence.
Q. Did it prove easy to hand out this kind of money?
A. No.
Q. Was Continental in a position to negotiate with the class representatives who had previously been negotiating with Fibreboard?
A. No. Continental was not.
Q. And why was that?

A. Because Fibreboard had entered into an agreement with the plaintiffs that provided that the plaintiffs would not speak directly to us without Fibreboard's permission.
Q. That was actually a contractual term of the original Ness Motley agreement, is that correct?
A. Yes
MR. WACHTELL: And that, Your Honor is Fibreboard exhibit 917.

Testimony of Meyer Koplow, counsel for Continental Casualty Co. Tr. 1334-1337:

A. It was intended to be a comprehensive letter.
Q. And it set forth our view of the issues and the prospects in the coverage case; it set forth the problems with Pacific; it set forth the impediments to direct negotiation; it set forth why we believed that any deal had to be done on a non-opt.-out basis, given the unique circumstances that faced the parties as we saw it; it set forth the threat that we saw of Fibreboard and the plaintiffs essentially torpedoing negotiations by entering into a unilateral global. Is that essentially correct? Without necessarily meaning to be exhaustive?
A. I will accept your representation with respect to it. I don't have a recollection independently of each of those items.
Q. Now let me direct your attention specifically as to the position asserted by Continental right then that it was its belief that any deal had to be done, if there was going to be a global, that it had to be done on a non-opt-out basis. And can you describe why that was Continental's position?
A. Well, first of all, as has been described by -- by other witnesses before me, we were absolutely not prepared to have a circumstance in which Continental entered into a deal that was essentially a one-way option in favor of the plaintiffs; that is, if things went badly for Fibreboard and the plaintiffs in the coverage

case, then we would likely have virtually no opt-outs from the deal, but if Fibreboard were to be successful in the coverage case, we had no way of knowing how many opt-outs that situation might cause to occur, leaving Continental bound but plaintiffs free to choose depending on their assessment of how they would be better off at -- at that moment in time.

Second of all --

Q. Can I just stop you there for a moment? Is it correct that that analysis was predicated in large part upon a timing analysis of the likely time of decision in the California coverage case by at least the intermediate court of appeal as compared with any reasonable prospect of the date upon which a class could be given an opt-out or no-opt-out decision?

A. Yes.

Q. The California coverage decision --

THE COURT: Gentlemen, I feel compelled to mention one thing. I have for 15 years struggled with a regular court reported till this trial. Mr. Kelley -- I have been going through the transcripts, and they appear remarkably accurate. It has been transcribed at the rate of twice the average daily number of pages, for four straight days now. He has to be tired. And between the two of you --

[Laughter]

THE COURT: -- and the rate with which you speak, I'm afraid we may compromise the accuracy of this record. So I, No 1, express my appreciation to him; and, two, ask you to slow down just a little bit.

MR. WACHTELL: I think, Your Honor, my speed is probably a function of fear of wearing out Your Honor's patience, which has been remarkable, and finding myself cut off. I'll slow down.

Q I don't know if we had an answer. Was it the analysis that the likely time of decision in the California court of appeal would come first before any reasonable date where one could anticipate that a class would be given the decision whether or not to opt out?

A. Yes.

Q. And I interrupted your answer. Other than the one-way option, what other factor or factors led to our position on this having to be a mandatory class?

A. The -- the only way that it made sense for Continental to do any sort of deal, given the magnitude, the obvious magnitude of the number of dollars that would be involved, would be to do it in a context in which it had absolute certainty with respect to the settlement amount. In the analysis that -- that was performed, the conclusion was that -- that there was no reason to give up the opportunity to achieve no liability through continued litigation of the coverage case if we weren't going to have a -- an ultimate deal in which we knew for certain how many dollars would be paid out.

Q. Now, is it correct that our law firm had had very considerable experience with respect to class actions?

A. Yes.

Q. And had settled large numbers of class action cases?

A. That's true.

Q. Did we have any philosophical objection to opt-out classes?

A. No. We've done them numerous times.

Q. And is the situation the same, when you're dealing with a futures class of asbestos victims in affording a right of opt-out, as it is, say, if you're affording a right of opt-out to someone who

Testimony of Meyer Koplow, counsel for Continental Casualty Co. Tr. 1341-1349

accomplished.

Q. Now, did we give consideration to the potentiality that we were being bluffed by the proposed unilateral global assignment?

A. Yes.

Q. And what did we conclude?

A. Our conclusion was that they indeed were prepared to go ahead and execute a global assignment.

Q. They had entered into the Ness Motley for tens of thousands of cases, is that correct?

A. Yes.

Q. And they were not shying away from a court in seeking to have the assignment concept approved, is that correct?

A. That's also correct.

Q. Now, you then had, as the testimony has indicated, the assignment program going forward in the threat of this global assignment. What did we understand was going on in terms of the Ness Motley action in this court and any proposed trial date or what was likely to be happening in that action.

A. We understood that the Eastern District of Texas essentially was a jurisdiction which one could expect a speedy trial. The issues were not to be so complicated before the court that -- that this would take a period of years. We understood that the pretrial discovery procedures were likely to be relatively abbreviated and that we could expect to see the matter go to trial within 1993.

Q. Do you recall it was reported to us that the court had indicated a trial date of I think July?

A. I don't recall that.

Q. Now, the trial would also include, if we were to lose it, the prospect of a contribution cutoff against Pacific; is that correct?

A. Yes. That was actually the more serious problem of having that -- that matter go forward to a litigated conclusion; that is, the risk of finding ourselves standing alone without our partners at Pacific.

Q. And just to be clear, the contribution cutoff that was being sought as in that action as a condition to approving the Ness Motley settlement was not limited to the Ness Motley numbers; is that correct?

A. That's correct.

Q. This was going to be an across-the-board cutoff as to any liability that Fibreboard might have?

A. It was global cutoff.

Q. And even after the first meeting with Judge Parker, did we understand that we were in a position to engage in direct negotiations with the plaintiffs' representatives?

A. Not at -- not at that time. We weren't in a position to have a discussion with the plaintiffs until after the April 9th agreement had been executed.

Q. Indeed, is it correct that the plaintiffs were taking the position that the sole function of Judge Higginbotham was to attempt to mediate the Ness Motley assignment litigation, and that they were not prepared to talk to us?

A. That's what the prior testimony here has been, and that's my recollection as well.

Q. And indeed the Ness Motley firm, as you've indicated, was under a contractual bar prohibiting them from talking to us; is that correct?

A. That's correct.

Q. And were those then the factors which led Continental to the negotiations resulting in the April 9th agreement?

A. Yes.

Q. Now, Continental obtained very significant benefits from that agreement, is that correct.

A. We believe that we did, yes.

Q. And let me tick off at least certain of them, then you can either agree with me, disagree, add, subtract.

The agreement agreed to bar any further assignments by Fibreboard or any settlements without Continental's consent; is that correct?

A. That's right.

Q. And it basically obtained for Continental direct access to the plaintiffs with Fibreboard acting jointly together with Continental to attempt to achieve a global; is that correct?

A. Yes.

Q. There were also releases in the agreement -- by the way, Your Honor, the agreement is Fibreboard exhibit 908.

The agreement also obtained for Continental certain releases from Fibreboard claims that Fibreboard was either asserting or threatening?

A. That's also correct.

Q. And it contained a release of any property damage asbestos victim claimed against Fibreboard, is that correct?

A. I believe that's correct, too.

Q. In return, Continental had to give things up; is that correct?

A. Yes.

Q. One of the things it had to give up was that it had to formally contractually agree to fund Fibreboard's current defense of cases, is that correct?

A. That's right.

Q. Now, there's been testimony that Fibreboard had -- excuse me -- that Continental had written a letter the previous July offering to do that, is that correct?

A. Yes.

Q. But this was now a contractual commitment that Continental was undertaking, is that right?

A. That's right. But that was not the -- that was not the principal thing that Continental gave up in the agreement.

Q. Okay. What was the principal thing that Continental gave up in the agreement?

A. Continental agreed that it wouldn't seek to do a global without Fibreboard, and that any global that it would do with Fibreboard would be funded entirely within Fibreboard's available insurance resources.

Q. Let me just focus on that. There was no requirement in that agreement that Continental in fact do a global, is that correct?

A. Well, there was an obligation that Continental would exert its best effort to do a global. There was no obligation for Continental to agree to pay any particular amount of money in order to get that done.

Q. And that was expressly provided -- and I'm looking at the exhibit, Your Honor, it says, "Fibreboard and Continental shall use their best efforts to jointly negotiate and finalize a global class action settlement with asbestos-related bodily injury death claimants as described in section 2 hereof" -- and I'll come back to that section 2 hereof -- "provided, however, that nothing in the foregoing shall obligate Continental to pay or obligate itself with respect to any particular amount or amounts of money or to agree to any particular term or terms in order to achieve such global settlement." And that's the proviso you were talking about, is that correct?

A. Yes.

Q. So that Continental was saying, "We're gonna try in good faith, we're gonna go out and try to do a global, but we're not committing ourselves," is that correct?

A. Well, we're not committing ourselves to pay any particular price that Continental may well have concluded was just too much.

Q. Now, at the time that this agreement of April 9 was entered into, was it -- what was Continental's and its counsel's perception of the likelihood of achieving a global settlement?

A. I think that we thought it was going to be difficult to accomplish.

Q. It was not a slam-dunk, is that correct?
A. Oh, no.
Q. Was there any assurance that any global agreement would ever be reached?
A. No.
Q. And referring now to the section 2 of the agreement, "Any global settlement Continental negotiates with claimants shall include all present and future asbestos-related bodily injury and death claims against Fibreboard." There's a provision for presently-settled claims which I'm going to skip over. "For the resolution of which Fibreboard shall not be obligated to pay more than amounts then or thereafter available to Fibreboard from Fibreboard's asbestos-related bodily injury and death insurance and its asbestos-related bodily injury and death-related insurance settlements," and there's a parenthetical. And that is the clause you're referring to, is that correct?
A. Yes, that's the other clause I was referring to.
Q. So that by this agreement, Continental was saying if there is a global, it will cover all Fibreboard liability, pre-, post-, present, future; is that correct?
A. That's correct.
Q. And Continental and maybe Pacific, if Pacific could be dragged in, would bear the entire tariff? That was the contractual obligation that Continental was undertaking by this April 9th agreement, is that correct?
A. That was the obligation.
Q. And that was the obligation that Continental undertook in terms -- in return for the concessions that it got from Fibreboard at that time. Continental agreed that Fibreboard would not have to contribute noninsurance assets, and Continental, rather, would pay the entire tariff that it would take; is that correct?
A. Well, the insurers would pay the entire tariff.
Q. Well, and if Pacific didn't pay it and if there was going to be a global, then Continental would have to pay it; is that correct?

A. That's correct. That's not the only thing that Continental gave up, but that was the largest.
Q. And was this an arm's length bargaining? Or would you term this some sort of exclusive deal to create a limited fund?
A. It was a horribly difficult negotiation.
Q. And each of the parties gave up quid pro quos, and this was a quid pro quo that Continental was forced to give up and to agree to; is that correct?
A. Fibreboard simply wouldn't do the deal any other way.
Q. And Continental thought, acting at arm's length from Fibreboard, that it was in Continental's best corporate interest to make that concession in return for what it was getting from Fibreboard; is that correct?
A. That's correct.
Q. Where was Pacific while all this was going on?
A. Well, Pacific had -- Pacific had made a separate deal with Fibreboard, first in 1991, and then again in 1992, as Mr. Snyder previously testified to, And I think it's fair to characterize

Testimony of Meyer Koplow, counsel for Continental Casualty Co. Tr. 1352-1356:

indefinitely.
Q. Okay. We've now had -- we've also heard testimony then that there had -- that there was the first meeting face-to-face, other than in Judge Higginbotham's chambers, first negotiating session between Continental, plaintiffs' representatives and Fibreboard, took place in Washington, and I think that's been fixed as April 29 and 30; is that correct?
A. That's correct.
Q. And is it correct you've heard the testimony of the various witnesses that that meeting was not particularly successful?
A. I've heard the testimony and it's accurate.

Q. There was a discussion set forth on mandatory class, and there was a debate on the practical issues and the like; is that correct?

A. Well, my recollection of the meeting is that, speaking for Continental, you, Mr. Wachtell, went through all our positions, of which there were a number, and that the plaintiffs repeatedly asked during the course of the day for us to put a number on the table, which is what they were most interested in, while indicating disagreement with virtually everything that you said. And we worked after the session concluded on the 20th to put together some numbers to hand to the plaintiffs the following morning. The numbers were -- were written out in your hand on a piece of paper that was distributed to the plaintiffs at 8:00 in the morning, at Mr. Inselbuch's office, where we -- where we reconvened.

Q. And that piece of paper actually is exhibit A to --

A. The May 12th letter, I believe, to Judge Higginbotham.

MR. WACHTELL: Which is Fibreboard 686.

Q. We set that forth to Judge Higginbotham to show what we had proposed to the plaintiffs, is that correct?

A. That's correct.

Q. Going back to the meeting, you heard Mr. Cox's testimony in which he indicated -- I don't want to characterize it -- that their attitude was, "Here's this new law firm here, what do they know about asbestos?" Did you hear that testimony, or essentially?

A. Yes, uh-huh.

Q. Was that a fair characterization of how we experienced the reaction of -- plaintiffs' reactions?

A. They -- they were not particularly tolerant of our -- of our coming into the case as we did, when we did.

THE COURT: Counsel, let me interrupt you a moment.

Mr. Welch, did you notice whether Jim Coleman is still on the floor? I'm not talking about in the courtroom. Is he outside?

THE MARSHAL: He is, Your Honor.

THE COURT: Would you please tell him I have no need of him right now, but I will at 3:00? Ask him to step in at 3:00.

Go ahead, counsel.

MR. WACHTELL:

Q. By the way, was it the case that our firm was novices about asbestos?

A. Well, we had not been active in the personal injury litigation in asbestos; but no, we were not -- we were not total novices.

Q. What had we been involved in?

A. We had been involved in aspects of Manville, and we had also been involved in -- in some representation of OCF.

Q. Now, was there also a discussion at the meeting about Continental's position with respect to Pacific and how that related to any proposal that Continental might put on the table?

A. Well, as the testimony has been up until now, it was Continental's position from day one, and it remained its position, and that never changed up until August 20th, that Continental was -- was prepared to do a deal only if it was an acceptable level of contribution to the price from Pacific Indemnity.

Q. And what did the plaintiffs say with respect to that?

A. "Nuts."

[Laughter]

Q. Now, on the morning --

THE COURT: They approached the battle of the bulge by then?

MR. WACHTELL: It's the 50th anniversary, Your Honor. Then it was like the 48-and-a-half, I guess.

Q. And you indicated that on the morning of the 30th then a dollar proposal was indeed put on the table and in fact was written on a piece of paper. And what was the reaction to that?

A. The plaintiffs took the copies of the paper and they -- they asked for an opportunity to caucus by themselves in a conference room across the corridor. They were gone somewhere between 80

and 90 seconds and they returned to the room and Mr. Inselbuch said words to the effect that they had been presented with a take-it-or-leave-it offer and they chose to leave it. And then they chose, themselves, to leave.

Q. And Mr. Bschorr arrived on the scene very shortly thereafter, is that correct?

[Laughter]

A. Mr. Bschorr managed to keep Pacific from being a part of the negotiations.

[Laughter]

Q. Okay. Now, to try to move quickly through the period of time after that walkout, is it correct that for a period of time thereafter the position of plaintiffs was, particularly in the meeting before Judge Higginbotham, that the global negotiations were over, that the only things to be discussed was resolution of the Ness Motley litigation, and that Judge Higginbotham's role was limited to assisting that negotiation?

A. That's correct.

Q. And is it correct that Continental's position was that the parties were essentially engaged in a

Testimony of Meyer Koplow, counsel for Continental Casualty Co. Tr. 1369-1370

MR. CLARK: Your Honor, if I may answer that question at a later date, as you might suspect, I'm not in a position to give you a definitive answer to that.

THE COURT: Very well.

MR. CLARK: So perhaps when we resume I'll have an answer for you at that time.

THE COURT: Thank you, counsel.

Was there a question on the table? Or were we getting to start a new question?

THE WITNESS: I think we had a --

MR. WACHTELL.: I withdraw.

MR. INSELBUCH: If I might, while Mr. Wachtell is attending the lectern, one of our exhibits was never filed with the court and was actually never completed and never distributed. And just for correctness, we would move to withdraw it at this time. It's Class Plaintiffs Exhibit 1012. And I thank the clerk for bringing that to our attention.

THE COURT: Granted.

MR. WACHTELL:

Q. I think I was asking and perhaps you answered the question as to what plaintiffs' reaction was at the May 5 meeting with Judge Higginbotham with respect to CNA's position that any global settlement would require adequate participation by Pacific. And I so ask --

A. I think I answered that question. And the answer was that we set forth the position that we consistently set forth both prior to and after that May 5 session with Judge Higginbotham.

Q. I'm asking you what the plaintiffs' reaction was to our position.

A. The plaintiffs' reaction was that this was an impediment, they weren't particularly interested in negotiating a deal that was then going to depend on whether or not a contribution was obtained from Pacific Indemnity, especially under circumstances where it was being set up as having to be at a level acceptable to Continental.

Q. Okay. Now, you, I think, had indicated the best way you thought to proceed was kind of to recount what happened next. By all means, go ahead.

A. Well, moving on from the May 17 letter -- well, moving on from May 5, my recollection is that there was a -- a meeting to discuss, among other things, the Ness Motley agreement that took place in Baltimore on May 13th. And essentially the meeting was largely restricted to Ness Motley, but Mr. Rice

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Ness Motley price. And at that session you indicated a willingness to recommend to Continental a price for global that was higher than the one that was offered to the plaintiffs on April 30.

Q. Now, I think you then referred to a meeting in Baltimore on May 25. And who were the participants in that meeting?

A. I was there, Steve Snyder was there, Joe Cox was there. We were supposed to have been joined for some period of time by Joe Rice, but my recollection is that Mr. Rice spent no meaningful amount of time at that meeting.

Q. And what is your recollection of what the -- what, if anything, transpired relevant to this proceeding?

A. Well, what transpired was that actually before I got there, Mr. Snyder had handed out a document to Mr. Cox, which was also given to me, that reflected far higher numbers of cases and values divided into cells which Mr. Snyder was throwing out as a concept on which a global might be based. I was surprised at it, because, as I said, both the number of cases that were being handled in the cells and the possible pre-'59 value was considerably higher than anything that we had discussed or had contemplated. But there was some discussion that day of using the cell concept.

The -- meeting continued until mid-afternoon and I had had an opportunity during the course of the meeting to be educated by both Joe Cox and Steve Snyder about historical levels of settlements at Fibreboard, and I heard at length from Joe Cox as to why he thought $13,000 a case was a reasonable value for pre-'59 cases.

Q. And was there then an arrangement to meet again?

A. Mr. Rice -- my recollection is that that was a Tuesday. Mr. Rice was going to be in Philadelphia on Thursday for -- for a Georgienne -- I think then it was Carlough hearing that was going to be going on. And since we had barely seen any of him in Baltimore, the suggestion was made that if Mr. Snyder and I came to

Philadelphia that we would be able to get some time with Mr. Rice to discuss global.

Q. And did that then happen?

A. Well, Steve Snyder and I went to Philadelphia. We did not see a lot of Mr. Rice. What we did see of Mr. Rice was extremely discouraging in terms of making progress on -- on a global.

And during the course of one of the long interludes in which we were waiting for Mr. Rice, I asked Mr. Snyder why it wasn't possible for Fibreboard and CNA merely to conclude their own arrangement without -- without the plaintiffs.

Q. And what was his reaction?

A. He said that this was something that Fibreboard had been interested in doing in the past, that it was Continental that had already indicated that this wasn't possible, and I heard from him about some of the history from Fibreboard's perspective on this. And I left that meeting, called you to let you know what the substance of the discussion had been, and we several days thereafter started discussing among ourselves the possibility of doing a bilateral deal, both because we were very discouraged, given the absolute no-talks attitude by Messrs. Kazan and Wartnick, and the difficulty that we perceived we would have in dealing with Messrs. Rice and Cox, and because we thought that quite possibly if the plaintiffs thought that we were going to do a separate deal with Fibreboard, it might increase their interest in coming to the table to talk about a global.

Q. And was there then exploration and discussion between Continental and Fibreboard as to the possible negotiation of a bilateral agreement?

A. Yes, there was.

Q. Would you recount it?

A. We held several meetings with the Fibreboard representatives during the month of June 1993 that were for the purpose of seeing whether we could reach a bilateral agreement that did not include the plaintiffs. There were meetings in New York, there

were some limited discussions in Washington, and you may recall that on June 30th, you and I attended a meeting at the Brobeck offices in San Francisco with a number of members of the Brobeck firm and with Michael Douglas, the general counsel of Fibreboard, in an effort to see whether we could reach agreement on a bilateral.

Q. What were the outcome of those discussions?

A. If I might, I'd like to -- I'd just like to interject something to pick up a thread that was left hanging from something I said earlier.

Q. Sure.

A. Part of the -- part of the thought in starting to discuss a bilateral was the hope that we could get the plaintiffs interested in something back to the table on a global. When that was reported to the plaintiffs, their attitude was basically, "That's fine with us; go ahead and reach a deal with Fibreboard. That would be perfectly okay."

We had a very difficult meeting on June 30th. There had been a lot of difficult meetings in this matter, but this one would rank right up there as a candidate for the most difficult meeting that we had. We were not close on price, we were not close on any other terms. It became very clear to us during the course of that meeting that it was going to be nigh onto impossible to reach a bilateral deal with Fibreboard. We had the Pacific Indemnity problem; that is, that we weren't prepared to lay out billions of dollars without an acceptable level of contribution from Pacific. The Fibreboard appreciation of a bilateral was that if they could not turn around and use the money to achieve a' -- a settlement, a global settlement with the plaintiffs, they would be left with the obligation of providing their own defense from -- from these funds, and they told us that that was going to be a very significant cost. And I got the very definite impression that the Fibreboard side was not in agreement as among themselves as to whether or not a bilateral agreement was something that was in the best interests of Fibreboard, and came away with the conclusion not only

that it would be a long time before we could put some of the people who had been in the room back in a room together again given -- given what had taken place that day, but also that there were people on the Fibreboard side who simply would -- would never agree to -- to the kinds of numbers that Continental might consider paying on a bilateral.

Q. You heard Mr. Snyder testify that the only reason that he was ultimately willing, on August 27, to accept the concept of a trilateral agreement was because I think he perhaps called it the carrot of the global, that it was the condition -- that his agreement to a backup trilateral was a condition precedent to getting the plaintiffs to go along on the concept of a Global. Do you have a view as to whether there was ever a prospect of successfully negotiating an independent bilateral or trilateral agreement with Fibreboard at a price -- well, at the price which is in the trilateral agreement?

A. I don't believe that we could have -- that we could have achieved that. We had extraordinary difficulty getting to a trilateral agreement, first in concept after the price parameters we thought had already been set, and then we had tremendous difficulty in getting from an agreement that had been achieved in principle in New Orleans on September 9th to a documented agreement which didn't get completed until more than a month after that. So it -- my own personal view is that but for the plaintiffs having imposed this condition upon us as something that we would be required to achieve before they would ever agree to document a global and work out the rest of the terms and conditions beyond the price term that would be necessary, was that there was no chance of achieving a separate bilateral or trilateral agreement with -- with Fibreboard.

Q. Let's go back in time now to whatever was happening with negotiations --

A. May I just add something to that answer?

Q. Surely.

A. I want to put a time frame on that. I don't think I ever thought about what might be achievable at some point after a coverage case decision, but certainly within the kind of time period that we were talking about in 1993.

Q. Let's go back to May 28th, where you're out cooling your heels in the corridors outside the Georgienne hearing. What happens after that in terms of any discussions with Ness Motley or any of the other plaintiff representatives?

A. Well, just so that we have the details straight, it wasn't a corridor. We had a small room across the corridor that was available to us, and that's what we used.

Q. With that emendation, would you continue?

A. The next thing that I can recall happening is that there was a discussion of -- a further discussion of numbers on a global with -- with Joe Cox. And I'm having a little bit of difficulty recalling whether it occurred just prior to a meeting that was held on June 15th with all of the plaintiffs' counsel or whether it occurred just after that meeting. But I think it occurred before that and it occurred in New York.

Q. And what was the nature of that meeting?

A. There was a -- what I'll call a further education discussion with respect to numbers. And the numbers that Joe Cox was talking about gave us some encouragement if we were talking about nominal amounts but were simply unacceptable if we were talking about present values.

Q. Now, you referred to a meeting of June 15th. Where was that meeting and who attended?

A. There was a meeting in Washington at the offices of Caplin & Drysdale. We met in the conference room across the corridor from the conference room which had produced such a successful result on April 30th. And the participants at that meeting were -- were, as I recall them today, Mr. Rosen and myself, there was nobody present from -- from Brobeck or Fibreboard, and Messrs. Kazan and Wartnick, Mr. Rice was there, I

believe, but I'm a little bit less certain that Mr. Cox was there, and Mr. Lockwood and Mr. Inselbuch.

Q. And what happened?

A. We had a -- a discussion of a number of issues. We discussed Continental's position with respect to a mandatory non-opt-out deal. And Mr. Rosen and I tried to explain, in as nonconfrontational a way as we could, that it was going to be impossible for Continental to do a global deal here that wasn't done on a mandatory non-opt-out basis absent some other device that for certain would have completely nailed down the -- the total price to the insurers up front. We didn't see any other way to do it. Despite Mr. Snyder's great creativity, he hadn't been able to set forth anything that we felt comfortable with. And none of the explanations of what the plaintiffs thought they could do fit the bill. And so we were left with mandatory non-opt-out.

The plaintiffs were most interested in getting a price or an indication from Continental that it would be willing to pay a certain price for what was referred to as a first tranche or first cell of claims, somewhat following up on Mr. Snyder's cell theory or proposal that -- that was used as -- was rolled out as a concept in Baltimore May 25. And we indicated that there was some flexibility from Continental on price, that we would go back and determine what Continental's willingness was with respect to an amount of money that might be paid on a global over the first five years of the global, and we were dismissed from the room for the plaintiffs to have a discussion about their position on 23(b)(1)(B) mandatory non-opt-out. Voices could be heard from the corridor, although it was difficult to make out what people were saying.

Q. This is not the California jailhouse, I take it.

A. No. This was the Caplin & Drysdale office. And Leonard Rosen and I were reluctant to appear at the conference room across the way. Sort of had a bad karma. And so we were outside in the corridor. And after some time, we were asked back into the room, and Mr. Rice proceeded to speak for the group. He indicated that the plaintiffs would be willing to consider a 23(b)(1)(B)

if we could articulate the legal theories on which it would be based, and assuming that we understood that it was going to cost a -- a good deal more ultimately for -- for us to do a closed-end (23)(b)(B) deal if we could satisfy them on a legal theory. Then the price might be -- if Continental -- and we always read that to be the insurers -- were prepared to deal with the cost at their own expense of the cases that opted out if we did an opt-out deal.

There was a list of questions that the plaintiffs left us with that they wanted answers to before there would be further negotiation or at any further negotiation. And I remember flying back to New York with Leonard Rosen and both of us were -- were encouraged that for the first time we were making some progress towards reaching our global.

Q. Now, you've indicated previously that Continental's going-in preference in these negotiations were to go directly to a global, bypass any separate Ness Motley agreement and have Ness Motley fold into the global, is that correct?

A. That's correct.

Q. And did a time come when Continental determined that that was not a feasible course of procedure?

A. Yes.

Q. Well, let me first, if I might, place it in time. The global that we were talking about certainly through the meeting on June 15th and beyond was a global that would include all cases, all presents, all futures. Continental's goal here was to get out of the asbestos business with Fibreboard. We wanted to do it in one package arrangement and we wanted that to be it. And, of course, in that sort of regime Ness Motley was -- the Ness Motley cases were a group of cases that would fold into any global.

As -- as June moved into July, it became less and less likely to us that we were going to be able to just hold the Ness Motley matter off and relegate it to a global. And that was for several reasons:

1. It has been some time that Judge Parker had let this matter sit with no real progress to show for it. We were extremely concerned that the matter was going to go forward to trial sometime in -- in the late summer.

We had finally understood that the California court of appeal would be through hearing argument on the coverage case sometime in the period likely before Labor Day. They were sending out notices of argument on the various phases of the coverage case on a fairly regular basis, about once a month. And unless there were some unnatural sort of hiatus, one could calculate that sometime between late August and the middle of September the coverage case was going to be submitted for decision. The procedure in California was we were advised that the court of appeal would have had its decision largely written by the time it heard the last argument on the coverage case and a decision could come at any time thereafter. But the global negotiations were -- protracted is the wrong word. Until June 15 there was no reason for us to believe there was any real prospect of negotiating the global. But given all the issues involved, it was going to be very difficult to do this before Labor Day, get it completed before Labor Day. And while the plaintiffs had indicated some movement on the 23 (b)(1)(B) mandatory non-opt-out issue, at least in terms of a willingness to consider it, the reaction of the plaintiffs to our position that we couldn't do a deal without an acceptable level of contribution from Pacific Indemnity was still, "Nuts." That's nuts in quotes. And the circumstance that we found ourselves in was that Pacific Indemnity, although regularly invited to the table, decided that this was a table that it did not wish to -- to visit, let alone participate at in a meaningful way, and that the position we found ourselves in was that there was leverage on us because of the 5.2 order issue being tee'd up in the context of the Ness Motley litigation here in the Eastern District of Texas and we had no leverage on Pacific, and that the only way that we could turn the table, so to speak, with respect to that was to get rid of the Ness Motley litigation, and the only way to do that was to settle the Ness Motley case. And so we concluded, as June turned into July and as it became apparent at the end of the month that no bilateral

agreement was going to be reachable, or at least so we thought, between Continental and Fibreboard acting without the plaintiffs, it became important to us to settle the Ness Motley cases.

Q. Now, there's been reference to a meeting in Washington which was then followed by a dinner of yourself, myself, Mr. Rice and Mr. Cox. Do you have

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throughout this period of time there were not only attempts by Judge Higginbotham to get a discussion going between Continental and Pacific, but there were, as I recall, some phone calls that went back and forth between senior management of Continental and Pacific, because it was a major objective of ours, indeed a necessity, to try to get them to the table, since the plaintiffs did not appear to be willing to deal on any -- on any basis that left a deal contingent on being able to get them in later.

We -- we were not eager to get back to the plaintiffs with answers to all the questions on the list, which I believe are set forth in the letter that I saw for the first time yesterday that went from Messrs. Rice and Cox to -- to Judge Higginbotham.

Q. Does that letter substantially accurately set forth where matters stood, to your best recollection?

A. From the Ness Motley perspective, I think, yes.

Q. We were getting close to an agreement on Ness Motley?

A. We were getting close to an agreement on Ness Motley. There had been numerous price negotiations. We were beginning to conclude that Joe Rice was just not going to budge off of $13,000 a claim for pre-'59 claims, which still struck us as a horribly inflated price given -- given the overall settlement history. We were not in agreement, although we had gotten close, with respect to the cash component.

And perhaps this would be a good moment to digress just for a moment. The Ness Motley settlement was not one that was happening in a vacuum. After the April 9 agreement was -- was signed, Continental and Fibreboard had a series of meetings, some in New York and I believe some in San Francisco, with a view towards developing a strategy for a national campaign to turn assignment agreements into three-party agreements. That was because we had assignment litigation that was coming up in other venues besides the Eastern District of Texas. The 5.2 order was at issue in other litigation. We knew we were going to have to deal with these matters. We were anxious not to be facing them in a courtroom context given the fact that we were now working or trying to work with Fibreboard to achieve a global. All of these arrangements where we were on opposite sides of the table with Fibreboard on litigated assignments just added to the complications of the difficult working relationship that we had to begin with. And so working very closely with Steve Snyder and Bill Levin and Helen Merrick from CNA and Larry Terry and Sarah Shields and Rod Eshelman from the Carroll Burdick firm, we had worked hard to put together a national settlement program in which we went to numerous law firms and offered to turn the assignments into three-party settlements with a discount for a cash component, with the balance contingent on what we've described as a triple trigger; that is, a resolution of -- in those days, it was a double trigger, but a resolution of the coverage case or ultimately a loss for Continental on the coverage case. And the Ness Motley negotiations were actually occurring in the context of our trying to reach agreements with -- with numerous plaintiffs' law firms that had these assignment deals. And one of the things that we discovered in those negotiations, and I should have mentioned this in connection with our decision to settle Ness Motley, is that no one was particularly eager to cut a deal with us only to find out that later on a more advantageous deal or more attractive deal had been cut with somebody else. And given the fact that the world knew there was this huge aggregation of Ness Motley claims that

was pending trial in the Eastern District of Texas, it became very apparent that it was going to be virtually impossible to settle anything other than a handful of other firms' claims without setting a pattern someplace. And the only logical place to set a pattern was with Ness Motley. Because we were confident that once we had achieved an agreement with the Ness Motley firm that there were so many cases involved that numerous other law firms would -- would be likelier to agree to a Ness Motley type settlement and we would be able to eliminate some of the assignment problems that we had around the country.

Q. Mr. Koplow, let me ask you on that question, during this time frame, June, July, going into that period, did Judge Higginbotham express any view as to with respect to whether we should back off of our position of going directly to a global as opposed to trying to get Ness Motley out of the way?

A. Yes, he did.

Q. What was that?

A. But again, if I can take things -- I know I went out of order by digressing back, but that comes a little bit later in July and I think I'd like to cover the first week-and-a-half or so in July.

Q. Go ahead.

A. What was going on in the first 10 days of July was, as I mentioned, we had gotten close on Ness Motley, close on the price, close on the cash component, and although there were still other terms of the agreement to be worked out, those were the places we had to start. Judge Higginbotham was putting pressure on to try to get to some agreement between Continental and Pacific. And as I said, we had -- we had had a horrible meeting on June 30th about a bilateral. We were due to meet with Judge Higginbotham and the Fibreboard folks and Ness Motley I believe around July 13th. And Just before that meeting, we received a letter from Fibreboard that appeared to us to be setting Continental up for a bad-faith claim in the event that global negotiations were unsuccessful.

Q. This is the July 9, 1993 letter?

A. That's the July 9, 1993 letter.

MR. WACHTELL: For the record, Your Honor, Fibreboard exhibit 583.

Q. Continue.

A. And I would say that it was -- it certainly is fair to characterize that letter as having to some degree substantially worsened an already bad relationship between Fibreboard and Continental. It did, however, provide some additional -- as impetus to get the Ness Motley cases settled and out of the way. With that letter as background, we met with Judge Higginbotham sometime around July 13th.

Q. When you say "we," who is that?

A. Leonard Rosen was there, I was there, Rod Eshelman was there and Larry Terry from Continental; Steve Snyder and Bill Levin were there, I believe, from -- from Fibreboard; and Joe Rice and Joe Cox were there. The meeting was at the federal courthouse in -- in Dallas. And Judge Higginbotham pretty much started the meeting out by expressing a view as to how we should proceed. And that view was that -- was that we should limit global discussions to future cases, that we shouldn't try to tackle the global until we had resolved Ness Motley, that we ought to open Ness Motley up. At that point one of the negotiating issues was whether -- what cap would exist on claims that could come in through the Ness Motley agreement, because as the weeks wore on, more and more cases were -- were reported to us as being in the inventory of Ness Motley law firms. And Judge Higginbotham expressed the view that rather than do a presents and futures global. We ought to use the Ness Motley vehicle as the mode for settling the bulk of the presently-pending Fibreboard cases. The view that Judge Higginbotham expressed, and I have a fairly clear recollection on this, was that he prefaced his remarks by making the comment that he had been having discussions with other judges and after doing so he had reached the conclusions that he then proceeded to articulate, namely what I just testified to.

Q. And did Continental take Judge Higginbotham's views to heart in how it proceeded thereafter?

A. Yes. Although I must -- I must say that we were not particularly happy about proceeding that way.

Q. And why not?

A. Because it was -- it was our view that splitting the presents off from the futures like that would almost certainly result in an overall increased cost to Continental. And I might add that it is my view that that is precisely what the effect was of severing the presents and futures.

Q. Now, you talked about people being able to prognosticate the likely scheduling of arguments in the California court of appeal. Toward the end of July, was the final argument in fact scheduled?

A. Yes, it was. I don't remember whether the final argument -- whether we learned of the final argument in late July or early August. I think it may have been early August. But it was certainly in that time period. And it was very -- it was very clear, again because the postcard notifications from the court of appeal kept coming on regular four-week intervals, that we were -- we were headed for a late summer submission of the coverage case to the court of appeal.

Q. An then it was scheduled for August 27, is that correct?

A. Yes, ultimately the last phase was scheduled for argument on August 27.

Q. So now we're I guess in the late July/early August time frame. What's happening? Focus at this point is on Ness Motley, is that correct?

A. The focus was -- was -- was on Ness Motley, and then our continued efforts -- that is, Continental's continued efforts -- to get Pacific to the table, because we were still quite concerned that without getting Pacific to the table we just weren't going to be able to get a global -- a global done, because of our position and the plaintiffs's -- and not only the plaintiffs', but Fibreboard's reaction to it as well.

Q. Okay. August 5 the evidence indicates that the agreement -- written agreement was reached on Ness Motley putting all of the issues to bed. And let me ask this: Is it correct to summarize that agreement -- and I know there are a lot of provisions to it -- that Continental succeeded in reducing the price in Ness Motley 1 in return for giving up its challenge to the assignment issue and giving up, I guess 50 percent of the amount -- giving up its challenge to the coverage issue as the 50 percent of the payments that it would make under the revised agreement?

A. Yes. Effectively what -- what happened was we got an agreement that was fairly close to -- to Continental's national program of trying to reduce these assignment settlements by 20 percent for a cash payment, and that cash payment in the Ness Motley case and then in the agreements we did with every -- virtually everybody else, we were able to reach agreement with was a 50 percent cash payment.

Q. Now, do you have the view as to what the numbers would have been or whether the numbers in the Ness -- revised Ness Motley settlement would have been any different if the negotiation were being conducted on a clean slate rather than under the gun of the first Ness Motley agreement and the imminence of litigation and the threat of the 5.2 order?

A. There's no question in my mind that the Ness Motley agreement would not have been settled at figures as high as -- as Ness Motley had used.

Q. What happened on August 5?

A. I don't want to lightly skip over the late July period

Q. Go ahead.

A. There were very difficult negotiations on the balance of the Ness Motley agreement, in particular relating to the futures provisions in the Ness Motley agreement, and with close to marathon sessions being put in to -- to get those -- those other provisions finally -- finally resolved. And we came to -- to Dallas on August 5th with agreement having been reached on -- on everything but with some cleanup left to do on the agreement.

Q. And was there a conference with the court on August 5th in Dallas?

A. There was a conference with the court that included Judge Higginbotham as well.

Q. And what happened?

A. Using one of the courtrooms in the federal courthouse in Dallas, Judge Higginbotham made an

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THE COURT: Be seated.

Mr. Koplow.

[Mr. Koplow resumed the witness stand.]

THE COURT: I understand one group of attorneys got displaced with carpet. Did you make alternate arrangements?

MR. INSELBUCH: We have, Your Honor.

THE COURT: Are you ready, counsel?

MR. WACHTELL: Good morning, Your Honor. Happy New Year.

Q. Mr. Koplow, where we left off, you were discussing a meeting that took place starting in Philadelphia on a Sunday night, and you were describing the fact that the plaintiffs indicated that they were no longer prepared to do a combined present and futures global settlement. Now, can you tell us what the problem was?

A. Yes. Just to -- to make sure that the chronology of things is -- is as I remember them, the events or the discussion in which the plaintiffs indicated they were no longer ready to do a presents and futures global took place the following Monday morning; but what we were told by the plaintiffs was that they simply didn't have a sufficient level of confidence in the information available on the unsettled presents to allow them to take on the risk, including the unsettled presents, within a global.

Q. And the risk being what, as you understood it?

A. The risk being that there would turn out to be more unsettled present cases than they were being advised of and that those cases would -- and the cases that were then listed as unsettled presents would turn out to be more valuable cases than any estimate being put on them by either Fibreboard or Continental. And in truth, there really was not a great deal of information on some of the unsettled presents; and because of the systems in our various states that permitted people to file cases without serving them on the defendant right away, in fact, there was a substantial lag time between any date and the date on which you could have a high level of confidence that you knew of all the cases that existed on that earlier date.

Q. Am I correct that the risk was if it turned out that there were more unsettled presents than were anticipated, that that would divert monies from the future class?

A. Yes.

Q. What happened after the plaintiffs said that that was their position?

A. Well, it was -- it was then clear that the only global we were going to be able to do with the plaintiffs was a futures only global. And we set to the task that day of once again reviewing all of the unsettled claims, first with Fibreboard, and then internally with the CNA people working on this, and ultimately, in the early days, with senior management of CNA to try to determine what CNA's exposure might be with respect to the unsettled presents. I know I'm digressing here for a moment. Under the agreement that had been reached with Pacific just the day before Continental was receiving a flat contribution from Pacific toward the presents. So to the degree there were significantly more unsettled presents or they were more expensive than anticipated, all of the cost was coming from Continental's pocket, none of it was being shared with Pacific.

And after trying to get a handle on the amount of unsettled presents, we were -- we were given authority at the end of the

day to increase the offer to be made to the plaintiffs to an amount of money that I strongly believed would be sufficient to get a deal done.

Q. Was there an offer on the table at that point from Continental and Pacific?

A. I think when we started that process the offer on the table was a billion three.

Q. And what happened then?

A. We had arranged that we would reconvene the meeting of all of the negotiators at 10:00 that Monday night; and after making a few remarks to the effect that this was it, that we were increasing our offer by a substantial amount, an amount that we thought would also reflect the plaintiffs continuing insistence that -- that we put a larger amount of money on the table to make up for the fact that Fibreboard wasn't there and available to the fund, I put the number of $1,500,000,000 out as the insurer's last offer.

Q. Now, you say to make up for the fact that Fibreboard was not available for the fund. Can you tell us what discussions there had been on that subject prior to your making this $200 million raise?

A. One of the -- one of the constant refrains of the plaintiffs from the point in time earlier in the summer when there seemed to be a recognition that we wouldn't do a global that wasn't a 23(b)(1)(B) was that not only was this going to cost Continental more, but it was going to cost Continental to put up an amount of money over and above what we may have thought was reasonable to cover the futures to provide call it a quotient, as it were, to allow for the fact that under what we were proposing, and given the April 9th agreement, Fibreboard -- Fibreboard's net worth was not going to be available to any future claimants.

Q. And what were the reasons which led to that offer to raise the amount being proposed for a futures only class settlement from 1.3 to 1.5 billion?

A. We were treating it more or less as a preempted bid. We did not want to get engaged in a negotiation given the fact that it

was now late Monday, August 23, and the coverage case was going to be submitted for decision on Friday, August 27th in a series of small moves. We wanted to put a number on the table that we thought was going to be and would in fact prove to be sufficient to get the deal done.

I had formed a belief that the lowest number we were likely to get the plaintiffs to take was a billion five hundred million dollars; and in terms of negotiating with these plaintiffs, I had formed the view that they had had and would have a difficult time determining when that's all there was and there was no more to be had.

And then raising one's bid progressively by steps, to my experience, tends to feed that feeling on the part of the other side, and therefore we did this all in -- we did this all in one fell swoop.

Q. And I think you indicated in a prior round, sir, that it was your actual belief that the $1.5 billion number would do it and would be a number that would be acceptable.

A. Uh-huh. That's correct.

Q. Going back to the question of the plaintiffs insistence that if Fibreboard was not going to be making a contribution and if the entire settlement was going to come from the insurers, the insurers would have to make up the amount, so to speak, was there a discussion as to what kind of amount the plaintiffs had in mind represented Fibreboard's equity or worth?

A. There were several occasions in which the number $200 million had -- had been bantered about, give or take 10 or $20 million. And there had also been at an earlier stage in discussions, and one that got carried through, the idea of setting up a separate tranche that would cover outer years, so to speak, that would be sized in approximately the same amount as Fibreboard's perceived net worth back in the summer of '93.

Q. And was the $200 million raise designated to meet that tranche?

A. We had already indicated that the offer was being structured in tranches before August 22nd, so that the $200 million that

was in tranche 2 was our first attempt to meet the plaintiffs concerns in this regard. That simply -- that simply proved not to be sufficient to get them to agree. And so this additional $200 million was yet another way to meet it, which means that at least in our view we had already put $400 million on the table to meet the -- to meet the concern over and above, frankly, what some of us would have viewed as an appropriate level to get a futures deal done.

Q. Did the plaintiffs indicate where their $200 million, give or take, number for the net worth of Fibreboard came from?

A. I was aware because the plaintiffs had informed us of the work that had been done by -- that they had commissioned to have done by Mr. Sinclair back at the time that negotiations got underway.

Q. And that was a number he had come up with for them?

A. I believe it was a number that was a little bit above $200 million.

Q. And that was, of course, a number that was higher than the reported book net worth of Fibreboard, is that correct?

A. I believe that it was higher than the reported book net worth, it was higher than the market capitalization of Fibreboard, it was a higher number than anything that you would get to using thumbnail valuation techniques, by a very considerable margin.

Q. So it actually represented work done by their banker and the advice given to them by their banker, is that correct?

A. That's what I understood.

Q. Now, at any time during this process did Continental attempt to persuade Fibreboard that it should kick in funds toward the settlement?

A. I can't recall ever directly asking Fibreboard to kick in funds. We had a contract with Fibreboard and we honored that contract with Fibreboard. On the other hand, we never threw ourselves bodily between the plaintiffs and Fibreboard on those occasions when -- or other than bodily on those occasions when the

plaintiffs would turn their fire on Fibreboard to see what could be extracted from -- from the Fibreboard representative at the table.

Q. And when you say that we had a contract with Fibreboard, you're referring to the April 9th agreement whereby Continental had agreed that if there were to be a global it would pay -- or it along with whatever other insurance assets were available to Fibreboard would have to bear the entire freight, is that correct?

A. That's the contract I was referring to.

Q. What happened was that Mr. Rice and Mr. Inselbuch walked out of the room. This had been after some joking when Mr. Inselbuch walked into the room, because he chose the seat closest to the door, which was an event that I remarked upon. And the two of them walked -- walked out of the room, leaving the other plaintiffs representatives, Mr. Wartnick, Mr. Kazan and Mr. Cox, and I believe Mr. Lockwood was there as well --

Q. Mr. Sweeney?

A. And Mr. Sweeney continuing to set at the table.

Q. Did anything else happen that evening?

A. There was a -- there was a significant amount of unhappiness on our side of the table. There had -- it was not a polite walkout. And there was a discussion that ensued about making one last effort to see if we could get all the parties on the same page by reconvening in Tyler and requesting the assistance of the court in the process at the end of the week. And due to people's schedules Thursday, August 26 was chosen.

Q. Prior to Thursday, August 26, had Judge Parker had any involvement in the global settlement negotiations?

A. Other than making the decision to appoint negotiating counsel and charging people to negotiate, no, he did not. Not -- certainly not that I'm aware of. And I would have been aware, I believe, if he had been involved.

Q. You previously referred -- I'm going to go back for a moment -- to the negotiations that commenced in Dallas immediately upon the appointment of negotiating counsel by Judge Parker back on I think it was August 9, is that correct?

A. Yes.
Q. And was Judge Higginbotham involved in those

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April 9th. In our trying to understand why discussions were proceeding with these particular counsel, having not been a part of those negotiations, we were -- we were anxious to satisfy ourselves that the three law firms involved and Caplin & Drysdale were the right people to be negotiating a deal with.

When -- I note that was one discussion and it, I'm certain, took place in the period April 9th, after April 9th, and before our first meeting was convened in Washington on April 29th.

After the April --

Q. Stay there for a moment. And what was discussed and what conclusions were reached?

A. What was discussed was that Fibreboard did describe to us what the history had been with respect to negotiating with these counsel. Told that Mr. Kazan and Wartnick were Fibreboard's chief adversaries on the West Coast, that counsel basically looked to them with respect to Fibreboard, that they were the most knowledgeable counsel and viewed as such by their colleagues on the West Coast with respect to Fibreboard, and that for those reasons they were the appropriate people to be negotiating with from that part of the country. We were told that the Ness Motley law firm was involved in somewhere around 50 percent of the asbestos claims in the United States and that they were generally regarded by the asbestos bar as being the leading law firm in this area, that they were folks that you simply could not ignore. And they had the ability, if they reached a conclusion that something was in the best interest of asbestos claimants generally, to persuade many of their colleagues that their judgment was indeed correct. And so that while they weren't the easiest folks to -- to

deal with, any of them, not just Ness Motley, the fact of the matter is that if we wanted to reach a deal that would indeed be perceived by the plaintiffs' bar generally as a fair and reasonable deal, these are the folks who would have to negotiate.

Q. It's fair to say that it was Continental's understanding that Fibreboard was negotiating with its principal adversaries, is that correct?

A. That's certainly what I understood from those conversations.

Q. Okay. Now, I interrupted you. Was there further consideration at any later date as to whether it was feasible or desirable to attempt to negotiate a global settlement with some different counsel?

A. As I believe I testified last time, there came a point in late May/early June where we had been pretty unsuccessful in moving global negotiations forward. Mr. Kazan and Mr. Wartnick were taking the position that there were no global negotiations and that all there was for us to negotiate were the Ness Motley agreement or for that matter the individual claims that -- that other counsel had against Fibreboard. And we had been unable to get any significant amount of attention from Mr. Rice except to the degree that Messrs. Rice and Cox did things at the direction of Judge Higginbotham. And so at the same time that we began to look at negotiating a bilateral agreement with Fibreboard because it looked like a global was going to be nigh unto impossible to reach, we also once again questioned Fibreboard with respect to whether or not, given what we viewed as the intransigence of plaintiffs counsel here, there might be other appropriately situated law firms with -- with whom we could carry on global settlement discussions.

Q. And what conclusion was reached?

A. The conclusion that was reached was the one that naturally followed from the information that we had been given in April; that is, that these were the appropriate people to be negotiating with, that were there to be other counsel with whom we

could negotiate, even hypothetically, that it would be viewed by members of the plaintiffs' bar as -- as an attempt to run around the people who were most aggressively, and in the toughest fashion possible, representing plaintiffs' interests. And we had engaged other people to, for want of a better term, reach some sort of a sweetheart deal when we couldn't get -- when we couldn't get these counsel to do a deal that they didn't believe was appropriate. That given the degree of respect that Mr. Kazan and Mr. Wartnick had on the West Coast, that it would be quite counterproductive to try to run around them and do something else, and that given the degree of participation in asbestos claims nationally and the amount of respect for the Ness Motley firm, that any deal that we struck with someone else would likely be stillborn because of the ability of the plaintiffs' bar to rally around any opposition that might be brought to such a deal by -- by Ness Motley. And so we concluded that -- that we would simply be wasting our time if we attempted to go around these plaintiffs' counsel.

Q. Let me now direct your attention to August 26, Thursday, 1993, where you say that this was the first time that Judge Parker had any direct involvement in the negotiations. Will you tell us what transpired?

A. All of the various constituencies arrived in Tyler midday on Thursday, the 25th, and we had, given the fact that discussions were either going to bear fruit or likely fall apart over the next 24 hours, I think virtually anybody who had participated in any phase of the discussions came to Tyler. So there were a very large number of people who were here and assembled in the courtroom and the lobbies and the various rooms off the lobbies and courtroom.

The judge got a smaller group of people to convene in the conference room that is directly outside his office and basically asked the parties to explain to the court where we were in the negotiations, how far apart we were, what the differences were, and the like. And over the course of the afternoon, both in what I'll call a committee of the whole and then in individual groups, the

parties met with the judge with no one's position budging in any degree that I can recall.

Q. You say that the general understanding was that either it was going to be -- my words, not yours, I guess -- make-or-break within the 24-hour period. Why was that?

A. The coverage case was being submitted for decision on Friday, August 27th. And there was great concern expressed by the Fibreboard people repeatedly, I might add, that there not only could be California court of appeal decision issued in the coverage case very soon after August 27th, but that they seemed to have information that the California court of appeal indeed would, and repeated suggestions by our side over the course of the summer that surely we had a little bit of time beyond August 27th, to Labor Day or perhaps a week or two beyond, given the number of issues involved in the -- in the coverage case, and our hope that the California court of appeal would -- would pay attention and modify any draft decision that had been -- been written based on oral arguments before the court. Fibreboard was really quite insistent that all we could really count on was August 27th, and the sword was likely to fall very, very soon thereafter. And everyone realized that no matter -- no matter how we perceived -- that is, the negotiators perceived the positions to be after such a decision was issued, because we all knew of the possibility that the California Supreme Court would -- would grant review, the fact is that were the court of appeal to decide in favor of Fibreboard, it would certainly make it more difficult with the broader plaintiffs' constituency to each a deal, and that no one could really predict how it would upset the applecart. And while we didn't have all the apples yet arranged on the cart, the fact of the matter is that no one was eager or optimistic about how easy a job it would be to reset the entire cart once the court of appeals decision came down.

Q. How about the converse? What if the court of appeals had ruled for Continental and Pacific?

A. Well, that likewise would have caused a serious problem. There's no question that the insurers would have, in my mind,

walked away from the offer that was on the table, and that while that would not have -- would by no means have ended matters, the fact of the matter is that that's also the upset applecart scenario. It would have taken a great deal of time to replace apples in the cart such that you could get a deal done.

Q. Do you believe that it would have been possible to get a deal done at the price that was then on the table if the court of appeals had ruled in favor of the insurers?

A. Oh, no. There's no way that the insurers would have -- would have agreed to pay not only the amount of money that was involved with respect to the futures class, but it would have had -- it would have had an effect on all of the present claims as well.

Q. In other words, the insurers would not have been prepared to enter into a deal that would have triggered the back end of the present claims for full value?

A. I think that we would have seen much renegotiation of settlements if indeed there was going to be anything that would have triggered a backout.

Q. Now, you have stated, in the various conferences that took place on the afternoon of August 26th with Judge Parker, that the parties essentially reaffirmed their position of Continental and Pacific at that time?

Q. Our position was that we had put a fully-priced offer on the table for a futures deal, that it was an enormous amount of money, more that we were aware at the time had ever been offered in any similar settlement, that we meant it when we said that that was it, and we were not going to increase that offer by any.

Q. With respect to Continental, was this a mere negotiating position? What was the actual authority and what were the actual instructions of the representatives of Continental at that time?

A. The actual instructions were not even to think about raising it by a cent, and not to come back and to ask for any more.

Q. And what about Pacific, as you understood it?

A. Pacific had made it -- had made it very clear. And here, too, I should backtrack. In the discussions that we had with Pacific over the weekend that led to the Continental-Pacific agreement of August 22nd, I personally had represented to the Pacific -- to the Pacific representatives, both principals from the company and their attorneys at White & Case, that I believed that a billion-and-a-half dollars in fact would obtain a futures global for the insurers. And Pacific had made it very clear that they were simply not prepared to go any higher than that amount of money and that basically we weren't even to think about it.

Q. Now, you have told us about meetings of the committee of the whole, as you phrased it, meetings of the separate parties before Judge parker that afternoon. Were there extensive discussions of the various issues that would go into the fairness of a settlement or the legal problems or any of the other issues that have been discussed in this courtroom now for over a week?

A. Oh, no. That's not -- that's not what went on at all. The exchanges were really on a -- I'll call it very superficial level. The plaintiffs were demanding, as I recall, still a billion nine hundred million dollars, and we said a billion-and-a-half and not -- and not a penny more. And while general arguments in support of our position were made to the effect of the ones I already alluded to -- that is, this was a huge amount of money, it was more money than anybody could ever reasonably expect to be paid for these claims, et cetera, et cetera, et cetera, there was -- there was nothing that you would term detailed analysis or even any analysis of all of the components or any of the components that one might examine on a fairness hearing.

Q. Did Continental and Pacific view the plaintiffs' ongoing demand for something like a billion nine to be a serious number?

A. No.

Q. And can you tell us from Continental's perspective or, if you know, Continental and Pacific's perspective, what the insurance company deemed was happening in the negotiation and why plaintiffs were out?

A. I don't know what -- I don't know what Pacific was thinking. I know that what we were thinking at the time was that

plaintiffs were making one last effort to see if we could be turned upside down to determine whether there was any change remaining in our pockets. And frankly, I think it's fair to characterize many of the plaintiffs' lawyers that we negotiated with, but certainly these four, as people who have never been aware of a penny in a defendant's pocket that they weren't going to fight and scheme to get for themselves, and do so endlessly.

One of the frustrations of the negotiations generally with respect to present claims as well had been the amount of time that one can spend on seemingly small items, because the negotiations tend to turn into a sporting contest on the part of a plaintiffs' lawyer to see what and how much can be gotten, as even small amounts of money seem to take on great amounts of significance. I can recall spending a fair amount of Judge Higginbotham's time, I thought, in not an appropriate fashion while we fought about 50 or a hundred dollars per claim on the Ness Motley deal. So what we perceived was going on was one final effort by the plaintiffs to see if by bringing us to Tyler and taking us all the way to the deadline date of August 27th they could manage to extract yet additional dollars from the insurers.

Q. Now, did Judge Parker at any time act in a manner other than you would deem to be a normal manner for a settlement judge trying to get the parties to reach their differences?

A. No. It's what -- what one would normally expect. Not even so much from a settlement judge as from -- as from a judge who had parties before him in a matter, knew that the parties were in settlement negotiations and basically used the best offices of the court to try to persuade the parties that having come as far as they had, that they ought to find a way to bridge the gap.

Q. What happened then?

A. The judge had somehow determined during the course of the day which folks from the negotiating group he would separate out to try to continue negotiations during the evening. And without being told where we were going, we were asked to get into

several vehicles that were parked in back of the courthouse, and it turned out that we were all being driven to the judge's home.

Q. And what happened when this core -- was this a core group of counsel, essentially?

A. He managed to select out the people who had done most of the negotiating.

Q. Maybe you better tell us who it was, or to your best recollection.

A. It was all of the negotiating counsel; that is, Messrs. Rice, Cox, Kazan, Wartick, Sweeney, Mr. Inselbuch from Caplin & Drysdale --

Q. For Fibreboard?

A. For Fibreboard, Mr. Snyder was there, Mr. Douglas, who was the general counsel, I believe, was there, Mr. Levin was also there, I think Mr. Erwin may have been there --

Q. From Pacific?

A. For Pacific. Paul Bschorr was there.

Q. For Continental?

A. You were there, Mr. Rosen was there, I was there.

Q. Is that your best recollection of the people who attended? I'm not trying to suggest to you that your recollection is wrong. I'm just asking a question.

A. No, I think -- I think that was it.

Q. Okay. And did Judge Parker indicate why he had brought this group out to his home?

A. Well, when -- when we were all assembled there, the judge indicated that he thought that -- that perhaps a more informal atmosphere would be conducive to getting everyone on the same page.

Q. What happened then?

A. Well, for a short while after we arrived, people -- people were eating hors d'oeuvres and enjoying the judge's refreshments. The judge then asked us all to sit down at a large dining-room table that I -- I believe the judge crafted himself. And the judge

patiently began to take the ball through what the differences were. And as I can recall them, there were essentially two:

1. The plaintiffs wanted more money from the insurers.

2. They wanted money from Fibreboard.

And there weren't, as I recall, any -- any more sophisticated issues than that. The insurers kept insisting that there was no more money to be had from the insurers and Fibreboard for a while continued to insist that there was nothing from Fibreboard and at some point during the course of the evening agreed that it would contribute some $10 million essentially consisting of another insurance policy that it still had, if that would get a deal done.

Q. Now, in the course of your deposition, and I don't have the page in front of me, but you made reference to an example that the insurers were trying to stay out on the lawn so they could avoid the judge pressuring them or something to that effect. Can you explain what you were talking about? In the first place, were you serious?

A. Well, the fact of the matter is that while -- while it was a 90-degree evening in Tyler outside, we were in the position of having been told by our client that there was no more money to be had from the insurers. The plaintiffs were continuing to demand some large amount of money above where we were. And the judge was -- was constantly focusing people on August 27th and how far we had come, and that we ought to be redoubling our efforts to get to the end.

Under those circumstances, staying inside was -- was likely -- was indeed a good deal hotter than being outside on the lawn. And given the fact that -- given the fact that we now had a partner, namely Mr. Bschorr, who was representing Pacific, who made it absolutely clear that he wasn't even going to talk to anybody except to repeatedly utter the word "no," it seemed to us as though it was a good deal less pressured outside than inside the house, which indeed it was.

Q. Did you deem that Judge Parker was acting in a way that was inappropriate in any respect?

A. Oh, no. This is -- as a veteran of -- of many years of judges in the district courts and bankruptcy courts getting parties to focus on -- on settling a matter, this was nothing other than what I was accustomed to. On the other hand, I would say that most smart advocates attempt to accommodate the views of district court judges and bankruptcy judges when they're in a position to do so. And we were desirous of -- of looking reasonable in front of Judge Parker and we were desirable of getting to a deal, if there was any way to get to a deal.

Q. But we were desirous of looking reasonable and getting to a deal, but we didn't have any authority to raise the offer whatsoever; is that correct?

A. That was the comfortable position that we were in.

Q. Did a point in the evening come when it was indicated to Continental and Pacific that Mr. Rice had indicated that he actually would take only a billion six?

A. Yes. Mr. Rice did -- did indicate that he would come three-quarters of the way if we would -- if we would come up a quarter of the way.

Q. Did you view this as a very munificent gesture on Mr. Rice's part?

A. No. Because I didn't think it was ever reasonable for him to be at a billion nine, a billion eight, a billion seven, or a billion six.

Q. What was the response of the insurers to this suggestion?

A. Well, the response to the suggestion was that we simply could not and would not do it, that a billion five was the most that we were going to be able to do.

Q. What happened next?

A. Well, it seems that the plaintiffs had also decided to go for a walk outside the judge's house. And at some point, Mr. Cox approached me on the lawn to indicate that there was going to

have to be -- there was going to have to be some additional movement by the insurers if we were going to be able

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Q. Chubb being the parent company of Pacific?
A. Of Pacific. And around 6:30 or 7:00 that morning, I was advised that the insurers would reluctantly go along with this, provided that that got a deal done.
Q. What happened then?
A. We were all due to reconvene at the courthouse that morning. And the parties reconvened. I remember thinking that this was it, we would get done. This had been a very long, grueling stretch, and I know people were anxious to get back home and see their families. And I labored under the mistaken view that having gotten this accomplished, we would be able to make an announcement in the courtroom that morning and I would -- I would get home for -- for the weekend.
Q. Did that occur?
A. No.
Q. What happened?
A. There were a myriad of things that people wanted to nail down. For one thing, the plaintiffs wanted to know what security was going to be put up by the insurers to absolutely guarantee that this enormous amount of money, which had now grown to over a billion-and-a-half dollars, would be there when the time came; they wanted to negotiate a rate of interest that they were going to be paid on this money from August 27th until such time as it would be paid over; the plaintiffs had all along insisted that just as Continental was unwilling to put itself and ultimately Pacific in a position where there would be a one-way option with respect to getting a deal done, the plaintiffs were no more keen on leaving -- no pun intended -- of leaving themselves in a position where the

insurers could get a free look at the coverage case; that is, that if the global for whatever reason failed to get approved and the coverage case went badly for Fibreboard, that at the end of the day they would have secured, in effect, nothing for -- for the class they were representing, and they therefore insisted that while they would agree in principle to a deal and agree on a price, they would do nothing else towards documenting and finalizing such a deal unless and until Fibreboard and the insurers had a deal in place settling the insurance coverage case as between them. That discussion then raised many of the most difficult problems that we had had getting to a bilateral agreement with Fibreboard earlier in the summer, which largely was a function of the fact that a billion-and-a-half dollars paid in a global is not, in Fibreboard's view, and I think they're right, the equivalent of paying a billion-and-a-half to Fibreboard outside of global because of considerable defense costs that Fibreboard would -- would incur outside a global.

There were also discussions during the course of that day about how the plaintiffs were going to get the benefits of the Home insurance policy that was being put up to cover Fibreboard's responsibility.

There had been also an element of this deal by which Fibreboard was going to agree to handle the processing of claims for some period of time, and there were what seemed like endless discussions about how long a period that was going to be for, what it entailed, and -- and what was involved.

And, frankly, it seemed like every time we resolved one problem, there was another problem waiting in line to -- to -- to be resolved right after the one that had been -- had been fixed.
Q. Was one of the issues the cutoff date as to when the plaintiffs class should be deemed to commence?
A. Yes.
Q. What was that?
A. There was a fight about whether -- whether it was effective after the 27th or effective the 27th.

Q. With Continental's position being that in essence the deal had been struck the previous -- A. That's right.
Q. -- night?
A. We agreed on -- as far as -- we were concerned we had agreed on a price the previous night and it shouldn't be affected by people dumping claims on the 27th.
Q. Now going back to the discussion that you were referring to that took place that day between Continental and Pacific on the one hand and Fibreboard on the other, for I guess what had come to be called a trilateral which the plaintiffs were insisting upon, is it correct that in those negotiations it was the position of the insurance companies that they were not going to pay one penny more in total than they had agreed to pay in the global context?
A. That's correct.
Q. And can you amplify a bit more just what Fibreboard's position was with respect to that?
A. Fibreboard's position was that it needed to get a significantly larger amount of money than that because there would be defense costs outside the global. And that inside a global, the vast bulk of the money was going to be for indemnity, that even the indemnity amount outside a global wasn't the same as inside a global, because of the vagaries of the tort system, and that in any event it was going to cost Fibreboard a great deal of money beyond that just to keep the amounts to that indemnity amount, and therefore it couldn't agree without getting a very much higher number which showed or reflected the defense costs. Not dissimilar from the analysis that -- that -- that the court has heard in prior testimony comparing the way trilateral works to the way the global works.
Q. And what was the response of Continental and Pacific with respect to those arguments?
A. We weren't prepared to do that. We had not been prepared to enter into a trilateral on that basis during the summer and avoid all the interesting experiences that we had with plaintiffs'

counsel, and we weren't prepared to do it having -- having gone through the global negotiations.
Q. And did a point come on that day of Friday, August 27, where Fibreboard ultimately caved in?
A. Well, Fibreboard and Continental ultimately agreed, along with Pacific, on a formula for -- for trilateral pricing which was from our point of view not going to cost us more than -- than the global would cost, but from Fibreboard's point of view got them some additional dollars beyond the billion five thirty-five.
Q. And was that --
A. Billion five twenty-five.
Q. And is that the formula that was ultimately recited on the record when the parties eventually went on the record that day?
A. Yes, it was.
MR. WACHTELL: Your Honor, I refer to page 17 of the transcript, the second element of price would be with respect to the future cases, and there we agree that the price, the bilateral price for that element of the bilateral agreement will be calculated and have two parts to it:
The first part would be an amount equal to the amount which Continental and Pacific have agreed to pay to the plaintiffs in a global, including in that amount or plus whatever interest may be earned or actually accrued on that amount, since interest is going to commence accruing today, and it is the net amount of that interest, if there are any taxes that would come off, that the entire amount plus the net interest would be devoted to the bilateral, and in addition the cost of the contemplated fees and expenses of the global that are saved by not doing the global, by which we would mean the costs and expenses referred to of plaintiffs' counsel, the notice costs that we are agreeing to, and in addition there is an obligation under the April 9th agreement to pay the counsel fees of Brobeck in connection with the global, to the extent any of those costs are saved that could be a relevant price term with respect to the bilateral so that the bilateral would be equal in cost roughly to what the global would have cost.

Q. And was that the essence of the understanding that was reached with Fibreboard that day, as was then recited on the record?

A. Yes, it was.

Q. Was anything learned during the course of that Friday, August 27th, with respect to what had transpired in California that morning, California time, on the final arguments of the coverage case appealed before the intermediate court of appeal?

A. Yes. As one might expect, we got a report from the -- from the participants in arguing the last phase of the appeal, and the report was that the information we had been getting from Fibreboard, namely that the California court of appeal was likely to hand down a decision, if not instantly, then close to instantly was in fact accurate, because we got a report that the court announced from the bench that it was intending to -- to hand down a decision imminently.

Q. Was agreement ultimately reached on these various items that you have testified were being threshed out during the course of that day, Friday, August 27th?

A. Yes. By the time sometime around 5:00 in the afternoon, the parties seemed to feel that they had reached agreement on enough points to be able to announce a settlement on the record.

Q And that is the transcript of that date, and Your Honor, I refer to the exhibit number, Fibreboard 592. Is that correct?

A. Yes, its.

Q. Was any communication then made to the California court with respect to the appeal that was then sub judice before it?

A. Yes.

Q. What happened?

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the course of those negotiations?

THE COURT: By anyone other than Mr. Wachtell?

[Laughter]

MR. WACHTELL: Thank you, Your Honor.

A. Well, yes. Total peace was -- was -- if you'll forgive the expression -- a war cry that was heard throughout the negotiation. And there was, I suppose, to no surprise, people who listened to the negotiations, there was not an agreement on what total peace meant.

Q. Total peace was term entered in the record on August 27, is that correct?

A. It was a term used by you in describing the settlement on the record.

Q. Without contradiction, is that correct?

A. There was no contradiction, as I recall, on August 27th.

Q. And was a resolution ultimately reached on this question of all other conceivable claims under the policy being cut off by the settlement as well?

A. Yes, it was.

Q. And what other come to your mind that proved most tenacious and most difficult to resolve?

A. Issues were -- were raised with -- with respect to who was going to bear the risk if there were -- if there were parties that needed to be cut off who for one reason or another the court could not issue an order cutting off. It won't surprise anyone for me to say that the plaintiffs were not particularly interested in -- in dealing with -- with the risk of those. And it was the position of -- of the insurers that what we were getting for our billions of dollars was -- was total peace. And therefore claims that could not be cut off would have to continue to be at plaintiffs' risk, not ours.

Q. And was that ultimately resolved?

A. That was ultimately resolved.

Q. By a compromise on formula?

A. Yes. There is a provision with respect to most of these claims, plaintiffs will have to reduce judgements. And then there

are another -- there's another narrower category of claims, but it's all clearly reflected -- amend that -- it's all reflected in detail in the global settlement agreement.

[Laughter]

Q. I hope it's clear. Were there discussions with respect to what would happen in the event there should be any sort of successful collateral attack on the -- on a prospective judgement approving the

Testimony of Meyer Koplow, counsel for Continental Casualty Co. Tr. 1494-1496

portfolio before most of the participants in the room learned really what it was the insurance companies did not want them to be permitted investments. There were many days and very long nights spent looking at how to craft spendthrift restrictions. These were not provisions that were simply lifted from somebody else's agreement someplace else, they were crafted from scratch, they were custom designed to deal with what the plaintiffs expected would be likely claims and claims flow against this trust. Runs were made to test how they worked. When they didn't work as well as plaintiffs might have liked because they viewed them as too restrictive, we renegotiated those provisions until we got them to a point that people were satisfied with, leading to some of the complicated formulas that are attached to the trust distribution process.

Q. Why did it make any difference to the insurers or to Fibreboard, for that matter, whether there were or were not spendthrift provisions in the trust or what they were?

A. Unfortunately, as the parties were aware, trusts that had been set up in other contexts to deal with mass tort claims, and particularly asbestos claims, had not always worked to make sure that the interests of the people who came along later in line were as well protected as the interests of the people who came along

earlier in time. Fibreboard and the insurance companies wanted to make certain that we weren't just putting up a sum of money here that would last for a relatively short period of time because of what came to be described by the shorthand term "field of dreams," that is, if you build a billion-and-a-half dollar fund, the claims will -- the claims will come, especially if you created claimant-friendly processes as we were attempting to do in connection with the trust such that it was -- it was easy to -- to file a claim and -- and get one's claim resolved. We were concerned that if there were no restrictions that the funds could be depleted in the early years, because the trustees were too generous in terms of settling claims, because the trust was ambushed in jurisdictions that were not friendly to the trust, that, as I described, a lot of claims came out of the woodwork that would never have appeared but for the existence of this billion-and-a-half dollar fund. And we wanted to make certain that a mesothelioma claimant or an asbestosis claimant who might come along 10 or 15 or 20 years from now would find that the fund still had money, was still capable of compensating that victim because we don't want and don't intend and this field is designed to make sure that such people can't come back and knock on the door in Walnut Creek or in Chicago, Illinois, or is it Saddle River, New Jersey, where Chubb is?

MR. BSCHOOR: That's good enough for your purposes.

[Laughter]

MR. WACHTELL:

Q. For the record, Chicago is the headquarters of Continental Insurance; is that correct?

A. Yes, it is, Saying, "What have you done for us late?" This is meant to cut all the claims off. And we felt that one of the essential steps in doing that was making sure that the fund was managed in a rational, fair and equitable fashion to make sure that no matter when somebody came along in time that person had a

reasonable expectation of obtaining fair compensation from the trust.

Q. When was a formal global agreement actually executed?

A. It was -- I can only say when Continental executed it, because there may have been people who put their signatures on the documents earlier in the

Testimony of Meyer Koplow, counsel for Continental Casualty Co. Tr. 1500-1506

that the fund was going to be equitably distributed, that being one of the factors that the courts look to under 23(b)(1)(B) as for reasons for utilizing 23(b)(1)(B)?

A. That is assumed within my -- within my statement that we felt that it had to be viewed being entirely fair and equitably distributing the fund certainly is one of the elements of -- of what we needed to be considered in connection with 23(b)(1)(B) and the fairness.

Q. Following up on that issue, you've referred to the fact that you wanted to make sure that later claimants had a reasonable expectation of obtaining fair compensation. Is there any certainty under this agreement or this trust distribution agreement that all claimants who may come forward in the years and decades to come will in fact receive compensation?

A. I'm not sure that other than death and taxes there's any certainty to anything in life. And there isn't -- there isn't absolute certainty with respect to this either. I think there is likely, because of the way this -- this operates, there is likely to be some amount of compensation for the most seriously ill people; but if for some reason, despite everybody's best expectations, mesothelioma claims were to -- to total a hundred thousand mesothelioma claims, I'm not aware that this trust, this fund or frankly any fund would be adequate to -- to provide them with historic amounts of compensation.

Q. Was the position of the insurance companies, Continental and then ultimately Pacific as well, in negotiating toward this $1.525 billion that they were going to be paying in the money for, that they were guaranteeing that everybody would ultimately be paid who came forward with a claim?

A. No.

Q. Can you tell us what the negotiating position of the insurance companies was?

A. We didn't -- we didn't and don't today know how many claimants there will ultimately be. I think the insurance companies, certainly Continental, is not settling here because it's concluded that there will likely be less than a billion-and-a-half worth of future liability for the insurance companies, certainly in the tort system, that -- that we are hopeful that there will be enough money to pay everybody, but, frankly, we don't know and we're not making any representations, and haven't, including in the negotiations that we had with plaintiffs, that this amount of money would ultimately, with 20/20 hindsight, prove to have been adequate to cover every claimant who has -- who has a claim against Fibreboard.

Q. Is it fair to say that the position of the insurance companies were that they were looking out to what their potential exposure should be were they to lose the coverage litigation, looking to the potential likelihoods of success or failure in that coverage litigation, and deciding that they were willing to pay a sum of money that represented a compromise and settlement of all of these factors?

A. That -- that is indeed a fair statement.

Q. Now, does the final global agreement as entered into between the parties, the formal agreement that is before the court, have anything in it about a possible incremental contribution to the trust fund should there be savings off a target figure on presents as you've previously testified was contemplated on August 26th and August 27th?

THE COURT: Counsel, I didn't follow. Say that again.

MR. WACHTELL: Let me try it again.

Q. You've indicated, Mr. Koplow, that late at night on August 26 that the insurance companies not only went up $25 million --

THE COURT: Talking about the 80/20 deal?

MR. WACHTELL: That's right, Your Honor. That's what I'm alluding to.

Q. Does that 80/20 deal, as you previously described it, appear in the final global agreement?

A. No, it does not.

Q. And can you tell us what happened to that along the negotiating trail?

A. That -- that deal proved to be one of the more difficult elements from -- really, from the very beginning, because we knew that when we discussed it on the night of August 26th that while Continental had a target unsettled present settlement figure, that was our best estimate, on August 27th, of $350 million that some of those unsettled present claims involved claims in which the Ness Motley firm was or could be involved, because not -- not every firm with whom they had an affiliate relationship was included in the Ness Motley deal, and indeed Ness Motley itself, as I recall, was not under an obligation to put all of its claims into the deal. There were a number of firms with which they had traditional relationships where when called upon to try cases they could and would be called upon that they did not feel they could break those -- those commitments to such counsel, and that therefore we would have to go through the list of unsettled present claims, identify the claims where there was a Ness Motley involvement, and remove those claims from -- from the deal. That is, from the -- the 80/20 deal. And that would necessitate putting values on those particular claims. And while the overall number was $350 million, there, I can't say that that number was reached by assigning a precise settlement amount to each and every claim. There were a lot of rough adjustments that were made. As soon as we sat down to try to -- to customize the $350 million, as it were, we ran into -- we ran into great difficulty, because every time -- this was a dynamic process. And every time an unsettled case became a settled case, it improved the information base for you to estimate what other unsettled claims were going to cost, in particular jurisdictions or with particular counsel, and so we were dealing with a number that was constantly moving.

At the same time -- at the same time, there were other problems that presented themselves that we hadn't anticipated on August 26th when we struck this deal. One of the problems that the court and counsel would be familiar with is the fact that some 4,000 Baron & Budd claims got filed on August 27th with the claim that they were present claims, not futures. Those claims were not included in any of the estimates that we had for unsettled present claims. Not surprisingly, Continental took the position that they were future claims, seeking vigorously to represent the interests of the class, class counsel said, "Well, they're not gonna be futures claims, we want you to pay them." That developed into a major dispute. And when it became apparent, as the negotiations wore on through the fall of 1993, that there weren't going to be a very substantial amount of savings in any event on the unsettled present cases, we decided on a substitute method to -- to provide both a solution to the Baron & Budd case dispute, which we were prepared to litigate fully to demonstrate those cases were -- were future cases by agreeing essentially that we would split the cost of those cases with the trust, which was a benefit of as much as $15 million or more to the trust, or so we thought at the time, and take out the 80/20 deal because it had just simply proved to be too difficult to -- to document, and in doubt. And I might add that as things turned out, it turned out to be a better deal for -- for the trust, in my view, than -- than -- than for Continental, because even under the most optimistic estimate of the unsettled presents cost, my understanding is that today the Fibreboard estimate, which is much lower than Continental's, is about $330 million, meaning that at most it would have been $20 million in savings, 80 percent of that would have netted $16 million for the trust under the best possible case, and my own view is that it is highly unlikely that there will be any savings on unsettled present cases.

Q. Now, what is your understanding of the interrelationship between the global and the trilateral agreements? Is the trilateral simply --

THE COURT: Before we get into that, counsel, why don't we take our morning break. Tell me how much longer you expect to be with Mr. Koplow.

MR. WACHTELL: I would think under an hour.

MR. BARON: Your Honor, while we're doing that, could he tell me what other witnesses they have today?

THE COURT: I trust he can. Mr. Rice has suggested that the court might have a

Testimony of Meyer Koplow, counsel for Continental Casualty Co. Tr. 1514-1516

cropped up after August 27th.

Q. And can you tell us what the problem was, briefly, and what was done about it?

A. Well, I can tell you what was done about it. Plant had been the exclusive distributor for Fibreboard products in northern California and I believe Nevada or a part of Nevada for a long period of time. And they claimed to have a contractual indemnity from Fibreboard. They also, we learned -- that is, Wachtell Lipton learned -- after August 27th had made claims to be an additional insured under the -- the Continental and Pacific insurance policies, additional coverage case. And in view of the fact that we could not settle for the amount of -- the amounts of money we're talking about and then still have to deal with additional claims from Plant that after all only arose because of Fibreboard's situation, we had to deal with -- with the problem of resolving the Plant liability.

Q. And was that resolved in the context of the global settlement agreement?

A. It has been resolved as -- as part of the complex of agreements that today constitute the global settlement agreement.

Q. Now, there's been testimony about the California Court of Appeals having reversed a previous judgement of the lower court

in favor of Fibreboard and against Continental in the Andrus matter. And has there been any further court proceedings, to your knowledge, in Andrus with respect to that reversal?

A. Yes. Last week the California Supreme Court denied review in Andrus, which means that the court of appeal decision will -- will not be reversed.

Q. That is a final judgement in Continental's favor, is that correct?

A. It's been remanded to the district court, as I understand it, consistent with the previous decision of the court of appeals.

Q. And what is the significance of that judgment against Continental and in favor of Fibreboard in the Andrus matter, as you understand?

A. Well, its significance to us is that there is now a final decision that affirms that Continental, during the period of the interim agreement, was -- was in compliance with its obligations to Fibreboard under the insurance policy and that all of the assignments that were made allegedly grounded on Continentals failure to meet its obligation to defend them to the insurance policy were breaches of -- of Fibreboard's end of the insurance contract.

Q. Is it correct that the policy by its terms barred Fibreboard from settling without Continental's -- entering into settlements without Continental's consent?

A. That's what the policy says.

Q. And when you say that these assignments constituted breaches, is it Continental's position that given the magnitude of the assignments and the consequences of the assignments, including as how they have been spelled out in the courtroom, that the breaches are of such magnitude and massive nature as to relieve Continental of any obligations under the policy?

A. That would certainly be -- be our position even if -- if the global settlement and trilateral settlement were not to obtain the requisite court approvals and Continental lost the coverage case, it would still be our position that because of Continental's actions we had no further obligations under those policies.

Q. Fibreboard's actions?

A. Fibreboard's actions, we had no further obligations under those policies.

Q. Was this a risk in terms -- from the vantage

Testimony of Meyer Koplow, counsel for Continental Casualty Co. Tr. 1523-1524:

determines to take his or her claim to -- to trial, which, of course, is the factor that has the potential for really causing the trust expense. And the theory behind this was that if in fact the trust made fair settlement offers, fair and reasonable settlement offers, they would be accepted at a very early stage, thereby eliminating the expenses to the trust that are entailed by carrying a claim along and into the litigation process.

Q. So that the structure of the trust is designed to minimize defense attorneys' costs as well as to cap plaintiffs' attorneys' costs, is that correct?

A. Well, it's designed to require a very small number of defense attorneys, if any, in the process.

Q. You do refer to the potentiality, if the various settlement steps do not achieve settlement of the plaintiff taking a case to trial, and I take it by that you're referring to this back-end opt-out position as has been referred to in the global settlement agreement.

A. That's correct. That's something that the plaintiffs insisted -- plaintiffs' lawyers insisted from day one as a part of any deal.

Q. And you talked about the trustees offering hopefully fair and reasonable settlements so as to obviate litigation.

A. Well, they're incentivized to do it, because if they don't offer settlements that are viewed as fair and reasonable, they're simply going to find themselves with those claims in the tort sys-

tem and the trust saddled with all the costs and disadvantages entailed for the trust by ending up in the tort system.

Q. I take it that means, then, by that token that the trustees are not going to be in a position arbitrarily to impose less than fair settlements; is that correct?

A. That's right. That's a safeguard that operates here.

Q. But a corollary of that also is -- and this goes to your prior testimony as to whether there was any guarantee or assurance that the amount of money in the trust would suffice to pay all claimants. The corollary of that is that the trustees cannot control the amount that they will pay out against claims, is that correct.

A. They don't entirely control it, that's right.

THE COURT: Well, they don't entirely control it as it relates to that portion of cases that may wind up in the tort system.

Testimony of Meyer Koplow, counsel for Continental Casualty Co. Tr. 1529 - 1542

impossible for plaintiffs to make a case, you could wind up 20 years from now with a vast amount of money left in the trust and no one to pay it to.

Between those extremes, if I follow your testimony correctly, it's your view that the probability is -- the great probability is we won't have drastic changes and that the safeguards should provide ample funds to take care of anticipated needs.

THE WITNESS: The wild card in that, Your Honor, is that I have never achieved -- speaking for myself alone, throughout this entire process, I've never achieved a level of comfort that anybody can really know what the total number of future claims will be. If the number of claims are the kinds of numbers that -- that people anticipate based on Dr. Nicholson's work, and

he does now have some tract record to go on, and if the numbers are--

THE COURT: If meso cases really are a measure?

THE WITNESS: Uh-huh. Then one, I think, could reasonably expect that this would be adequate. But there are a number of things that could happen that could change that. The propensity to sue could go up. That would affect the claims numbers. The settlement is not a settlement that affects only claims in the United States of America. If someone were to find a way to -- to mine meso claims around the Subic Bay in the Philippines or another Pacific location where the Navy used a lot of Fibreboard product, for example, we could see a source of claims that I don't believe is really worked into anybody's claims base. And there's just no way, as we sit here today, to know whether that will or won't happen.

Likewise, we could -- we could turn out to have substantially fewer than the 186,000 claims that we used as a basis, which was at the high end of Dr. Nicholson's projection, not at the low end. So it's difficult -- I'm obviously not endorsing the court's invitation to opine on the adequacy in terms of what will happen in the future, because there are a number of wild cards here that one can't know, but --

THE COURT: Well, if the future holds a change in products liability law that makes it much more difficult to secure compensation, it occurs to the court that the future claimants under this trust agreement may very well be better off than future claimants in the tort system, because they at least have the mechanism here to secure compensation.

THE WITNESS: There's no question about that, Your Honor.

THE COURT: Now you can put on your bankruptcy hat.

MR. WACHTELL: Before he puts on his bankruptcy hat, let me ask another question which ties in with what we've been talking about.

Q. Is it correct that there was a very recent amendment entered into among the parties to the trust distribution agreement?

A. There have been several recent amendments. And if I'm being offered the opportunity to speak about them, let me --

Q. Feel free.

A. -- let me talk about them generally. First of all, while a great deal of work was put into creating the spendthrift provisions that we originally had, it did occur that as people ran the numbers through the Cornell model, which Your Honor will hear about a little bit later in this proceeding, there were a disturbing number of scenarios in which the spendthrift operated to delay payment on early claims that ultimately got paid after being delayed for a while, while still leaving a considerable amount of money left -- considerable amount of money in the trust at the end of 60 years. Obviously that was not a result to be desired. And in looking at -- at potential solutions that the parties, largely at plaintiffs' instance, came up with a way to loosen up the restrictions or give the trustees some discretion to loosen up the restrictions somewhat so that earnings from the second run of $200 million could be brought up to deal with earlier claims if indeed there were extensive delays provided that the trustees were able to satisfy themselves that this was not going to prejudice the rights of later claimants. So there would be more of a dynamic later look at what experience was telling us would be the likely volume and flow of future claims. And so that amendment was made.

In addition to that, another device was crafted to deal with the problem of there being more claims than anticipated and the delays that those claims might face by giving the trustees the ability to make one-time offers to people waiting in line if there had been delays --

THE COURT: Similar to Robbins?

THE WITNESS: I'm not familiar with how the Robbins mechanism works, Your Honor, but if somebody felt that taking a $3,000 payment immediately rather than 5,000 or $6,000

that might still be delayed over a period of years was advantageous, the trustees could clean up the claims that way.

In addition to that, there were a number of technical changes that over time seemed to be appropriate. The parties were overly optimistic when we drafted these documents as to how long the notice process and approval process might take, and had created a situation with the -- with the spendthrift mechanism so that if it took us two to three years from the time we originally negotiated this deal until the trust was cleared to start paying claims because we had received final judicial approval, we had only made one year's worth of principal available to deal with what would be a backlog of claims. And so we made the logical fix, which was to permit the trust fund to be viewed as having started back on January 1, 1994, and if, for example, you weren't to obtain the ability to start paying claims until January of '97, you would have three years of principal made available. That was a technical change.

There's also a provision in the -- in the trust distribution process that allows the trustees to make or deal with something called an expedited review option. If someone, for example, has a pleural claim and wants to have expedited treatment from the trust, the trustees have the ability to say people who file this abbreviated claim form nevertheless establishing disease and exposure, but with a good deal less information than the normal process would entail, we will send 250 or 500 or whatever the amount of compensation is immediately without the need to wait in line or go through the entire claims review process.

A question was raised as to whether we had made it impossible for that to be done if there were people waiting in line. That wasn't intended -- it wasn't intended to work that way. And so that was -- that was cleaned up.

I'm trying to think on whether there were any additional items covered by the amendments. If I had the notice document, it would be helpful. But I'd be happy to explain the reasons behind any of the others.

Oh, yes, I heard the initials SCB, and that jogs my memory. Originally the select counsel for the beneficiaries was a five-person group. As part of our desire to have this deal perceived as fair by the broadest possible constituency, when organized labor took a look at what we had brought here, it expressed the concern that it wanted to have an opportunity to directly monitor the ongoing operations of -- of the trust for the benefit of its members, and asked to have a seat on the SCB. The parties viewed this as a reasonable request and one that would allay fears of union members that this was a deal that was not in their best interests. And so we expanded the SCB, and it was necessary to add yet an additional seat so that we didn't end up with ties on the SCB. But that change was made as well.

Q. Was there likewise a change made with respect to statute of limitations concerns?

A. Yes. We had meant originally to -- to make sure that no one with a claim that was not time barred on August 27th found themselves time barred against the trust in the future, but that provision did not find its way into the final documentation last year. That was one of the amendments.

Likewise, we had all had a recollection that we were to have included a provision in the documentation that treated all claims filed before the global was finally approved by the court as deemed filed on the same day, because there are -- there are advantages to being first in line. We didn't want anybody to have an advantage because they were able to get a claim form first by going to one of the class counsel in this case. We wanted there to be no suggestions that anybody could possibly been favored with respect to getting in line, and so we wanted all claims treated as filed on the same day for the cue purposes. That change was also -- was also effected so that the provision now does appear in the documents.

Q. Putting on your bankruptcy hat, Mr. Koplow, at any time during the negotiations which ultimately led up to this global settlement agreement, did Continental ever focus on the issue of

whether there was some means to put Fibreboard into a bankruptcy proceeding and attempt to accomplish the same kind of goals that the global settlement seeks to accomplish through the aegis of the bankruptcy laws or under the aegis of the bankruptcy laws?

A. We looked at everything that we could think of. And this was certainly one of the things that we thought of. And the conclusion of experienced bankruptcy counsel was that it simply could not be done. The requisites for -- under I believe it's section 303 of the Bankruptcy Code of 1986 which mandate that there be three creditors that have claims that are due and unpaid and are in the aggregate unsecured to at least the extent of $5,000 simply could not be met. Fibreboard had very carefully structured all of its settlements, including the post-'59s, so that payments were not due on them. And they were paying their other creditors in a timely fashion. And so they could not properly have been put into an involuntary proceeding. Other buyouts were by plaintiffs.

Q. At any time during the negotiations which led up to the global settlement agreement, did any of -- this is before or after formal designation of negotiating counsel as negotiating counsel, or after preliminary class certification and prior to the December 23rd of 1993, at any time during this process did any of the plaintiffs' counsel ever ask for a special deal for their present cases as some sort of a quid pro quo for agreeing to a global?

A. No.

Q. Now, you have testified several times --

A. May I add to that answer, Mr. Wachtell?

Q. Sure.

A. I would simply like to add that had any such request been made, it would have caused Continental a very serious problem in continuing to negotiate with that counsel as a member of the group. We were intent on and have remained intent on making certain that there were no extraneous threats to getting a global settlement approved here. And --

Q. Threats or inducements?

A. Threats or inducements.

Q. Now, you have testified, I think, on several occasions that at one or more points during the negotiations, plaintiffs' counsel were taking the position that the only thing to be negotiated was the Ness Motley agreement; is that correct?

A. That is correct.

Q. And I think you have indicated that that position was being maintained not merely by the Ness Motley attorneys, Messrs. Rice and Cox, but was being adamantly maintained by Messrs. Kazan and Wartnick as well; is that correct?

A. Oh, yes. They're the ones who refused to sit down and discuss anything with us.

Q. Did you deem that that refusal or that position on behalf of these plaintiffs' counsel was designed to secure some special advantage to the Ness Motley firm or their clients?

A. No. We viewed it as a very affected, and frustrating to us, negotiating ploy.

Q. Can you explain?

A. The Ness Motley settlement, which had been the subject of a lawsuit seeking its approval in this court, created a -- a massive amount of pressure on Continental Casualty Company. And the reason for that is that --

Q. When you say -- you mean the initial Ness Motley settlement?

A. The initial Ness Motley settlement.

Q. Continue.

A. The fact is that the Eastern District of Texas has had some of the largest, if not the largest, awards against Fibreboard. In taking a look at the reasonableness of the settlement amounts in that agreement, it was hard for us to see how this horde could simply forget about the prior settlements or verdicts in the Eastern District of Texas, that albeit those were vastly higher than -- than Fibreboard historic settlement values, it put Continental at a great disadvantage in terms of its ability to be able to get those amounts down. It was plain as day, Mr. Rice and Mr. Cox stated it from

the earliest meetings I can -- I can recall with them to discuss the Ness Motley agreement and to discuss the global, that they were not prepared under any circumstances to have some deal done for their clients and then say, "We're starting with a clean slate with respect to pricing on the global." It was very clear to us that to the extent we couldn't get the Ness Motley pricing down, that we were going to end up with -- with an expensive global settlement. And that is precisely what happened. I think that's exactly what -- what Messrs. Rice and Cox and Messrs. Kazan and Wartnick intended to have happen when -- when they insisted on having the Ness Motley agreement be the only subject of discussion when we did not put a number on the table for a global that they found to be acceptable. And there's no question in my mind that the consequence of all that was -- was that we have a more expensive global settlement than would otherwise have been the case.

Q. Is it correct that in the original initial Ness Motley agreement that Continental was facing numbers on an assignment basis that had been entered into by Fibreboard of approximately $18,000 per pre-'59 claim?

A. I don't remember the precise number, but that's the neighborhood.

Q. And is it correct that that was also facing interest on unpaid balances which had been fixed between Fibreboard and the plaintiffs at 10 percent?

A. We had the problem with the interest, we had the problem of the contribution cutoff order that -- that had to be granted in connection with the Ness Motley settlement that would have cut off our rights against Pacific, not only with respect to that settlement, but with respect to everything. And there was no question that it was an expensive deal in an expensive jurisdiction which probably would have had some difficulty discounting its prior experiences in Fibreboard in adjudicating the reasonableness of those amounts.

Q. So you're saying that in your estimation in negotiating for the second Ness Motley agreement, Continental did not have the

luxury of negotiating on a clean slate but was operating under the threat of what would happen to it in that litigation and what the likely outcome or possible outcome of that litigation would be if it could not enter into the second Ness Motley agreement; is that correct?

A. There's no question Continental found itself in a difficult position, and that position was exploited by class counsel.

Q. Exploited by class counsel first to get higher values for Ness Motley and second to use those values to ratchet up the values being used in the global, is that correct?

A. That's correct.

Q. Do you have a view as to -- maybe this is implicit or even explicit in everything you said today, but do you have a view as to whether class counsel got everything that Continental and Pacific were prepared to pay as a price for global settlement agreement?

A. I'm not aware of anything that -- that Continental had left that wasn't extracted from it. And based on -- based on my experience in -- in getting permission to go up from the billion five, I can't imagine that there was anything that Continental was -- was holding in reserve. And I believe that -- that we had a contractual commitment to -- to Pacific from August 22 on not to go above a billion five, which was the result of our having told Pacific that we were quite certain that that would be it and that frankly we weren't prepared to go above that number.

Q. Let me cover just one technical matter, and I'll do it by a leading question, having to do with

Testimony of Meyer Koplow, counsel for Continental Casualty Co. Tr. 1547-1550:

CROSS-EXAMINATION BY MR. BSCHORR

Q. Just a couple of small areas, Mr. Koplow. You indicated, just to clarify the record, you used the term in connection with I

think it was claims that were being filed around August 27th, you used the words "dumping claims." Did you mean by that that at about that time there were a number of plaintiffs's counsel that were rushing to the courthouse to file a lot of causes which ultimately became known as what we call the surge in cases?

A. That -- that term as I used it was meant to -- to refer to that. With respect to the claims filed August 27th, it was meant to refer to filing claims in almost no matter what form the claims existed in order to beat a deadline.

Q. Including claims that might have had over a hundred pages of plaintiffs' names, just to get the cases filed, such as Mr. Jaques did in Cleveland?

A. I'm not aware of what Mr. Jaques did in Cleveland, but what you described certainly would fall within my meaning of the term "dumping claims."

Q. You previously were talking with Mr. Wachtell about the 80/20 situation and the arrangement that had been made on August 26th and 27th which was not followed through in the final global. Do you recall that testimony.

A. Yes.

Q. Am I correct that that entire issue of the 80/20 split and how to deal with it and how to deal with the Baron & Budd claims was an issue between Continental and Fibreboard which did not involve Pacific?

A. My recollection of the Pacific-Continental deal is that with respect to the present claims, Pacific contributed or agreed to contribute a flat amount; and so from that, it would follow that it should have affected Continental.

Q. You responded to a question from Mr. Wachtell that as far as CNA was concerned, and as far as you, as counsel for CNA were concerned, you were unaware of any representation by CNA as to whether this 1.535 million dollars -- billion dollars would be in fact enough to cover all the claims. Do you recall that testimony?

A. Yes, I do.

Q. Do you have any view, based on conversations you had with Pacific, including myself, as to whether we had any such representation concerning that subject?

A. I'm quite certain that no such representation was made or implied by Pacific at any time that there was a discussion or negotiation that I was involved in.

Q. Beginning in April of 1993 and leading through the discussions that you've previously testified about culminating in December of 1993, with the final global agreement, do you recall any position by Fibreboard with respect to the treatment of pre- and post- '59 claimants as to how they should be treated.

A. After -- after April 9th, with respect to pre's and post's in a global, I believe the Fibreboard position was that there wasn't a reason for differentiation.

Q. And is that -- is it not a fact that that position --

A. Other than -- I should correct that. Other than the way the mechanisms of the agreement would deal with those claims. So, for example, if there were an agreement that people would be paid historic settlement values, then to the extent there had been a differentiation there would continue to be a differentiation, but there was -- there was no suggestion by Fibreboard that these claims needed to be treated as though they were -- they were different types of claims.

Q. Indeed, it was Fibreboard's negotiating position that they should not be treated any differently, isn't that correct?

A. I believe whenever that subject came up, that was the Fibreboard view, but with the caveat that I placed on it.

Q. Yes. Thank you. Throughout the negotiations that you participated in with class counsel, am I correct that the law firm of Caplin & Drysdale was involved with the four class counsel in those discussions?

A. I -- yes, they were -- they were involved in those discussions. Obviously not every discussion we had involved everybody from every one of the players on the plaintiffs' side, but, yes, they were involved, clearly involved in the discussions.

Q. And you testified that in April 1993, at the end of April, there was a meeting at the Caplin & Drysdale office, and I take it representatives of Caplin & Drysdale were present at those negotiations.

A. Oh, yes.

Q. And many times thereafter they were also present, leading up to August 26, when I think you

Testimony of Meyer Koplow, counsel for Continental Casualty Co. Tr. 1557 - 1559

Q. I want to turn to another brief subject, Mr. Koplow, that has to do with the legal ethics area. You are aware that one of the objectors has presented testimony, at least in deposition, and will present testimony here with respect to legal ethics issues? Are you aware of that, sir?

A. Yes, I am.

Q. In addressing one area that was discussed with that expert, did there ever come a time that CNA on its own behalf for Continental and Pacific together determined that there was one cap amount of money available to be split between the presents and future claimants?

A. No, I don't think it would be fair to say that there was a time when the insurers concluded there was one capped amount of money.

Q. So there was no direct competition at any time between so-called present claimants or future claimants for individual dollars that were available from the insurers, is that correct?

MR. BARON: Your Honor, I object to that one. I don't believe he's laid a foundation for it.

THE COURT: Overruled.

A. With the caveat that there was obviously some overall cost to the insurers that they ultimately would conclude they

weren't prepared to exceed, I did not view the present claimants and the future claimants as being in direct competition.

MR. INSELBUCH:

Q. Indeed, as you sit here today, you do not know what the sum total of the expenses for the insurers will be; isn't that correct?

A. Unhappily, that is correct.

Q. And neither does Mr. Bschorr, isn't that correct?

A. I'd be shocked if Mr. Bschorr had better information on this than we did.

Q. Are you of a view one way or the other whether the plaintiffs' class of future claimants would have been better served had they been represented by lawyers, competent, able, hard-working lawyers who had no other involvement in asbestos cases rather than lawyers who indeed had involvement, even current involvement, in asbestos cases?

A. While I have no empirical data to support my view, I am confident that had we been dealing with counsel that did not have both the experience and leverage that this counsel had, that we would have been able to negotiate a deal that would have been less expensive to the insurers.

Q. Finally, I think you forgot one of the assets that does come into the trust. Do you recall under the global settlement agreement, if and when it is approved, that Fibreboard also was to assign to the trust any claims for contribution it might have that result from any and all present claims?

A. I -- I had forgotten that. That is correct, that's one of the trust assets.

MR. INSELBUCH: That's all I have, Your Honor.

THE COURT: Do you have any questions, Mr. Baron?

MR. BARON: One or two.

MR. SHAW: Your Honor, I have a few I can do now or after lunch.

THE COURT: How long will you take?

MR. SHAW: Just a very few minutes, Your Honor.

THE COURT: Why don't we wait till 1:30. I've got a telephone conversation set up for 12:30. Given the fact of the conversation of counsel relative to these prospective witnesses and the commitment that I have, I'm going to take an hour-and-a-half for lunch instead of the usual hour,

Testimony of Meyer Koplow, counsel for Continental Casualty Co. Tr. 1570 - 1576

A. I don't think, given the particular circumstances of this insurance coverage dispute, that -- that that was a particularly attractive prospect to Continental if an overall resolution could be reached at -- at a satisfactory price.

Q. So they wanted what you refer to as total peace, they wanted away from this problem?

A. Well, they were going to put up the kind of money that they've had to put up to resolve the problem, yes. They wanted and expected that they would have to have total peace.

Q. Well, if they could have gotten out of this litigation in the sense of being able to work out a settlement that would have cost them less money but they would have had to continue to process claims in the future, they might have been willing to do that, would they not?

A. If there were some degree of certainty that it would have cost less money.

Q. Okay. So the issue was really, and truly the bottom line, how much money were they going to have to pay to get out?

A. The bottom line was: Would they be able to obtain certainty at a certain price?

Q. In your deposition, you talked about Continental wanting to get out of this thing without a tail. What did you mean by that, "Without a tail"?

A. Without the prospect of additional claims coming back for Continental's account in the future.

Q. All right. For instance, you know what a 23(b)(3) class action is, do you not?

A. Yes.

Q. And that's one where claimants are given the right to opt out if they decide they don't like the terms of the settlement?

A. That's correct.

Q. Okay. Mr. Koplow, that was not a way that Continental could cut off their tail liability and get total peace, was it? It wasn't something that was an available option for them?

A. Not under -- not under the -- the circumstances that existed with -- with respect to the Fibreboard situation.

Q. Because the liability would be open-ended at the back end?

A. Well, because the liability could be open and because the only way that people were prepared to deal with Continental was under circumstances where Fibreboard's liability would be covered entirely through its insurance.

Q. Right. And you didn't want that tail?

A. For the kind of money that we are talking about, Continental was not prepared to do a deal that left it with open-ended liability.

Q. Because you couldn't estimate that liability. Right?

A. There was no way to know for certain what Continental's total liability would be in connection with that.

Q. Would it be fair to say, Mr. Koplow, that throughout the negotiations of what became the Ahearn settlement, not just Continental but all of the parties operated under the assumption that there was no way to know how many claims there would be in the future with any degree of precision?

A. I don't know what was -- I don't know what was in everybody else's mind. I know that we didn't think that there was a way to determine it. And I know that the plaintiffs took the position that if the class was going to take the risk of bearing the claims, that they were going to demand a significantly higher price than if that risk were left with Continental. And I believe they both demanded and got a higher price for it.

Q. Okay. So the plaintiffs agreed to take the risk of being wrong on the back end of the future claims that there might be more than what they had anticipated. Right?

A. That's correct.

Q. Now, in terms of the present settlements, the ones that were made for the Ness Motley group, that was an argument why they didn't want to include the presents in the class action, because they couldn't predict how much it would actually take to pay those claims. Right?

A. No. I don't think with respect to the Ness Motley settlement.

Q. Well --

A. I think I've testified about unsettled presents, and Ness Motley was not an unsettled present.

Q. You're absolutely right. I misstated that. In terms of after the Ness Motley agreement was settled, in terms of going forward with a presents unsettled and futures claims class definition, the plaintiffs' lawyers told you that they didn't want to do that because they couldn't accurately predict the amount of money that was necessary to pay the unsettled presents. Right?

A. That's correct.

Q. And they were unwilling to accept a risk that they might be wrong as to those unsettled presents?

A. I think that they felt that there was considerably more difficulty in dealing with them than there might well be in dealing with the future.

Q. They felt it was much more difficult for them to predict how much the 50,000 or so unsettled presents would cost than it

would to determine how much it would cost to pay for all the claims in the future forever and ever and ever. Right?

A. I think that -- that it is fair to say that, but not without focusing on the fact that there is a considerable difference in dealing with claims that are immediate and need to be addressed immediately than there is dealing with a bunch of claims that are spread out over a much longer period of time.

Q. The need -- what's the difference?

A. The difference is that the present value of those claims is -- well, to state it another way, if I've got -- if I've got 150,000 claims to be managed over a 60-year period of time, there are a lot of things that I can do with respect to those claims if in fact I'm off by 20 or 30 or 40,000 claims. I mean, even relatively short delays in paying some of those claims or spreading them out permits you to deal with them. If you're dealing with 40 or 50 thousand claims that are here-and-now claims that have to be dealt with immediately, it has much more of an immediate dollar impact. And if you guess wrong, then -- then it has a more serious impact.

Q. And so the present claimants, you couldn't spread out their payments, but you felt more comfortable in spreading out the payments to the future claimants?

MR. INSELBUCH: Objection.

A. I don't know whether you could or couldn't, Mr. Baron.

MR. INSELBUCH: Objection. Misstates the witness's testimony.

THE COURT: Overruled.

MR. WACHTELL: I have the same objection. It isn't a matter of spreading out those claims. Those claims are going to come in over 40 or 50 years.

THE COURT: Overruled. Go ahead.

A. Could I hear the question back?

MR. BARON:

Q. Well, is what you're telling me, Mr. Koplow, that in terms of determining how much you need for future claims, you have

the ability of spreading those claims out over a long period of time, and if you miss by 20 or 30 thousand, perhaps you can defer payment to some of them and spread it out over a longer period of time, than the problem you have if you have present claimants who are knocking on the door wanting to be paid today and they don't want their payments spread out?

A. It's not just the ability to spread them out. If you have 30,000 or 40,000 more claims over a 60-year period of time, Mr. Baron, depending on how those claims spread themselves, it may very well be no problem. But it may very well have been that -- I understand if the class plaintiffs took this position that with respect to existing, already-filed claims, they did not want to get into the business of affecting those claims or running into a situation where any of those claims might be delayed in payment.

Q. Okay. Was there ever a discussion of defining the class in terms of people who had already manifested asbestos-related disease as opposed to those people who had filed lawsuits? Do you recall such discussions?

A. I can't say with certainty that there never was

Testimony of Meyer Koplow, counsel for Continental Casualty Co. Tr. 1583-1589

Fibreboard and resolving their problems?

A. I think -- I think that Continental was considering all sorts of things at the time, Mr. Baron.

Q. Well, was that one of the items that they were considering, going to Fibreboard and just getting a buyout of the policy?

A. As of March 10th, I do not know the answer to that question. I know that when the subject came up, which it did again intensively in late May and early June of 1993, this was not treated as if it had been carefully considered and carefully rejected in the February/March period.

Q. Okay. Now turn to, if you would, the document under tab 21, which is a letter dated May 12th, 1993, from Mr. Wachtell to Judge Higginbotham again. And so that we can have context -- well, first, did you participate in reviewing this letter, putting it together?

A. I don't have a specific recollection of putting the letter together, but I -- I would be shocked if I -- if I hadn't played a role in it, given what I was doing at the time.

Q. All right. Turn to page 6 of the letter, if you would, under the heading "mandatory class action," and specifically, if you would, look at the second paragraph. Are you with me?

A. Uh-huh.

Q. I'm going to read the first sentence or two: "Continental is aware that plaintiffs perceive both legal and political problems with structuring the settlement as a mandatory non-opt-out class." Did you perceive those problems, you, yourself?

A. Well, I understood from -- from plaintiffs that -- that that was their view; that is, that a mandatory non-opt-out class action was traditionally not the kind of thing that was greeted with open arms by members of the plaintiffs' bar dealing with -- with tort actions.

And with respect to the legal issue, as you well know, the plaintiffs made every argument they could think of as to why this would be a much more difficult route to follow.

Q. Okay. Turn to page 15 now, if you would, please. I turn your attention to paragraph 6, numbered 6, concerning this report that Mr. Wachtell provided to Judge Higginbotham. He states: "Any political problems can be ameliorated to the extent that plaintiff's representatives could be deemed to be acceding to a mandatory class structure at the strong urging of the judiciary." What did Continental, through their representatives, your law firm, mean by that?

A. That -- I think that the language is self-explanatory on its face, but certainly what it was intended to convey was that it would be easier for the plaintiffs' lawyers to explain what they were doing

if they were able to indicate that this was something that had been urged upon them by Judge Higginbotham.

Q. Okay. And Continental felt it was important to convey that to Judge Higginbotham, apparently.

A. Well, obviously, we felt that it was worthwhile putting it in a letter that went to the judge and that went to plaintiffs' counsel.

Q. Do you know whether a copy of that went to Judge Parker?

A. [Pausing]

Q. Do you know?

A. I don't know whether it went to Judge Parker or not.

MR. BARON: You know, it would be a lot better, you would give better answers if Mr. Wachtell wouldn't be nodding up and down all the time.

MR. WACHTELL: I apologize. I think I was nodding sideways, not up and down.

MR. BARON: I apologize.

THE WITNESS: It had no effect on my answer.

MR. BARON: I'm sure it didn't

Q. Would it be fair to say --

A. I think it would be fair to say that had it gone to Judge Parker, he would have been cc'd on the letter; and as I think you know, he was not.

Q. All right. Well, would it be fair to say that at least by the time that letter was written in May of 1993, Continental, based on the statements that were made by Judge Parker and the material that was being reported to Judge Higginbotham, had a high degree of confidence that if they could work out a settlement that was a 23(b)(1)(B) settlement, that in terms of the legal problems involved they would have a not terribly difficult time with the district court approval of the 23(b)(1)(B)

A. I don't think that's correct at all.

Q. So even though Judge Parker had indicated in a pretrial that he thought 23(b)(1)(B) could be used, should be used, and even though Judge Higginbotham, as you've testified earlier, was urging the parties to go forward with a settlement of this basis, Con-

tinental was concerned that the courts might not approve the legal foundation of the settlement?

THE COURT: Counsel, you keep using the word "should." As I heard the letter, it used the word "could," did it not?

MR. BARON: No, Your Honor. I'll read it again. Says "Chief Judge Parker informed the parties at a status conference before him on March 10, 1993, that he believes that a global settlement should and can be achieved by the use of a mandatory non-opt-out class action." Again, whether it's an accurate reporting, I don't know, but that's at least what the position of Continental was in the letter.

A. The difficulty I have with your question is that, one, it sort of collapses time frames. My prior testimony about -- Judge Higginbotham I thing relates to a period of time around July 13th, which is well after the time frame that we're dealing with here; and second of all, I think we understood at all times that what the district court might approve and the Circuit Court of Appeals might affirm depended to a large degree on -- on all of the facts and circumstances of -- of the global settlement. And -- and I don't think anybody, in any of this correspondence, has suggested anything to the contrary. And at this point in time, a global was nothing more than a gleam in Continental's eye.

Q. But at least they've had some level of confidence that the legal theory to implement a global on a non-opt-out class would be welcomed by the district court?

A. I think that we knew at the time, to the extent there were positions on the law in prior cases that had been taken by Judge Parker, what his views of the law were, just as we knew what the views of the law were of other district court judges and what the law was with respect to 23(b)(1)(B) in various circuit courts around the United States.

Q. All right.

A. And there is -- as you well know, the standards are not uniform from circuit to circuit.

Q. Okay. Now let's talk for a moment about Fibreboard's objectives and what they were attempting to do here. What did you consider to be the primary objective of Fibreboard in these negotiations in terms of end results?

A. I don't think -- I don't think that there was any secret about it. Fibreboard's objective in the negotiations was to shed its asbestos liabilities without having to spend any of its own assets in doing it.

Q. And that's ultimately what happened, isn't it, if this settlement is approved?

A. That is ultimately what will have occurred, with some small exceptions.

Q. So the bottom line, then, if you really add up what's happened, would you agree with me that if this settlement is approved, Continental is able to dollar out its obligation once and for all to asbestos victims of Fibreboard and to Fibreboard, Fibreboard is able to walk away from all asbestos-related claims without spending any of its own money other than insurance money, and the risk of there being a large number of claims in the future that are unanticipated today falls on the plaintiffs' class?

A. I think you've left something out.

Q. What have I left out?

A. What you've left out is that in the course of all this, Continental and Pacific will have paid an enormous process and eliminated the risk that there won't e any significant amount of money to pay a single one of these class members.

Q. Right. So that risk has been transferred through money over to the plaintiffs' class?

A. The plaintiffs have obtained an enormous

Testimony of Meyer Koplow, counsel for Continental Casualty Co. Tr. 1593-1594

plaintiffs' counsel, on August 27th, understood that the other side of the case, the defendants, Fibreboard and Continental, would not object to a fee up to three percent?

A. They understood that there was a source from which they could be paid a fee of up to three percent that did not involve the corpus of the settlement fund.

Q. All right. Now, the lawsuit in this case was filed on September the 9th, was it not?

A. That's correct.

Q. All right. Did you review the pleading that the plaintiffs' lawyers drafted before they filed them?

A. I saw those pleadings before they were filed.

Q. All right. Now, Mr. Koplow, was there ever an anticipation on the part of anyone, that you're aware of, to end up in a litigation class action in this case?

A. No, there was no contemplation of ending up in a litigation class action, although we recognized that it was not inconceivable that someone could make an effort to do that.

Q. Okay. And indeed in the ultimate settlement agreement there is a provision as to what happens if the settlement is not approved or is reversed in some way and the global falls through?

A. I don't recall that, Mr. Baron.

Q. Do you recall that provision that you pointed out to me in your deposition that takes parties back to their original position in the event that there is a global disapproval?

A. I don't believe that there is any provision in the agreement that specifically calls for the parties to dismiss the action. And frankly, were there, it wouldn't make any difference, because these plaintiffs and these counsel could turn around the next day and file precisely the same action against the very same parties, or even more parties if that's what -- if that's what they chose to do. So were there such a provision in the agreements, and I don't believe that there is, but were there such a provision, it wouldn't be worth very much. In addition to which, I think the record should also reflect that tone can't, on one's own, simply dismiss a class action. It requires the approval of the court.

Q. Okay. Would it be fair to say that before the lawsuit was filed in this case, all of the parties had an agreement on the amount of money that it would

Testimony of Meyer Koplow, counsel for Continental Casualty Co. Tr. 1601-1604

even in the case of a coverage case win.

Q. Okay. Did you ever estimate the cost to Continental of a coverage case win? By Fibreboard. Excuse me. If Fibreboard had won the coverage case, what would it have cost Continental?

A. I don't think I know the answer to that question.

Q. can you state it would have cost more than what's being paid under the trilateral?

A. I think if we didn't have an expectation that -- that the -- the cost of that would have been more, then we would have opted for another route.

Q. If Continental had not been able to reach a global settlement, a non-opt-out class action settlement with the plaintiffs, was Continental willing to do an arrangement with Fibreboard such as the trilateral agreement?

A. Mr. Baron, I think I -- I testified both at my deposition and at the last session of my testimony -- my appearance here, that an effort was made by Continental to try to reach a trilateral settlement agreement, but without success.

Q. Well, are you telling me that you don't think Fibreboard would have accepted the amount that they ultimately accepted in the trilateral but for the mandatory non-opt-out class, even though they believed that it was better to have a complete win in the insurance litigation?

A. I think Mr. Snyder is telling you that, looking back today, that the decisions that were made by Fibreboard in the fall of 1993, that those decisions resulted in significant benefit for Fibreboard over what they otherwise would have had. All I can tell you is that my experience in dealing with Fibreboard over the summer of 1993 was that it was impossible to achieve a trilateral settlement. We tried very hard. We would very much have liked to have done that. And then, when we finally got down to the short strokes with respect to a global, lo and behold, major obstacle was getting Fibreboard's agreement to the terms of a trilateral that didn't cost us appreciably more than a global. I mean, once we had that agreement, we spent two weeks fighting because Fibreboard felt that they still needed t have substantially more money than that. And then once we had an agreement with respect to that, it took us almost five weeks to get that agreement in writing because of all of the remaining concerns that they had. And that's -- that is what I am relying on. I'm delighted, however, looking back on it, Mr. Snyder feels that he got a good deal and approved Fibreboard's position.

Q. Which settlement is going to cost Fibreboard more, the global or the trilateral?

A. Looking at it today, it would be my guess that the global settlement will cost Continental.

Q. So as of today, would you prefer that Continental go forward only with the trilateral?

A. No.

Q. What are you getting for the extra money?

A. We're getting a -- a deal that sees the insurance company's dollars go out mostly to victims and not to lawyers and not to Brobeck, in particular.

[Laughter]

A. We're getting a deal -- I didn't mean to single Brobeck out, but the fact of the matter is that you're talking about taking $2 billion from insurance companies and spending hundreds of millions of dollars on law firm defense costs. And whether it's

Brobeck or it's Wacthtell Lipton or Debevoise, or anybody else who is in the defense business, the fact of the matter is that it is extremely bothersome to the insurance company to see the dollars going that way when there are still at the end of the day people saying, "We've been injured, we need to be compensated." That's No. 1.

No. 2 is that Continental believes, and believes very firmly, that if this global is approved that there will not be another knock on the door at CNA Plaza in Chicago, Illinois, at some point down the line seeking to disturb or upset the arrangement, and that there's a fair higher risk of that happening in connection with the trilateral settlement agreement.

Q. Okay.

A. And what we are buying here for enormous amount of money is total peace.

THE COURT: Mr. Baron, in East Texas, witnesses like Mr. Koplow have been designated as tar baby witnesses.

[Laughter]

THE COURT: The court has always had sympathy for lawyers who attempt to cross-examine tar baby witnesses.

[Laughter]

MR. BARON: I can use all the sympathy I can get.

[Laughter]

MR. BARON:

Q. Let's talk about -- so one of the reasons that

Testimony of Mever Koplow, counsel for Continental Casualty Co. Tr. 1614-1615

MR. KRISPIN: I stand corrected.

A. That's how I understood the question.

MR. KRISPIN: So the record is clear, I adopt that caveat.

Q. Those number in the neighborhood of some 50,000 or thereabouts

A. Which?
Q. Both present cases in Ahearn. Present unsettled cases.
A. The total of unsettled presents I think is somewhere in the range of %0,000 cases.
Q. All right. So right with those two -- those two factors, we have some 250,000 cases that would need to be necessarily dealt with under Continental's policy of insurance, at the outset?
A. No. We added 180 to 50, and I get 230, not 250.
Q. All right. 230. And multiplying that times 500,000 as a per person aggregate limit, clearly it's excess of $100 billion exposure. that is not to say that in fact that would in fact be the indemnity that Continental pays should those claims actually go to judgement and payment is sought?
A. Mr. Krispin, there are something like 200,000 present claims against Fibreboard with an aggregate cost of something under $2 billion. We can sit here all afternoon, I'm not going to agree with you that 180,000 future claims have a value that essentially is 50 times what the cases we've already settled, litigated, settled after verdict. It just - you can do the math if you want to do the math the way -- the way you're doing it, but I can't agree with you that the potential exposure under those circumstances is a hundred billion dollars. It isn't a hundred billion dollars. It's ignoring reality to say it's a hundred billion dollars.
Q. Well, my question does not ask you to value the cases. My question simply asks: What is the outside risk that Continental Insurance Company would experience under its policy -- general liability policy which is the subject of coverage litigation now pending in California. I think it begs the obvious that if you've got an aggregate per person limit of $500,000, you simply multiply that number times the number of claims that could conceivably come within the policy to arrive at what the outside limit is.
A. Well, first of all, I'm under oath. And I'm not, while under oath, going to agree that there's a risk that I don't believe under any conceivable set

Testimony of Meyer Koplow, counsel for Continental Casualty Co. Tr. 1637-1640

negotiation of the trilateral agreement.
A. That is correct.
Q. There was no one there at the table at any time from August 27, 1993 until December of 1993 that represented the interests of the class of future claimants, such as Mr. Coleman now is in the Rudd defense class action?

MR. WACHTELL: I think counsel meant October, when the trilateral was entered into, not December.

THE COURT: Whatever that date was.

A. The only participants in those negotiations, Mr. Krispin, were Pacific, the lawyers for Continental and the lawyers for Fibreboard.

MR. KRISPIN:

Q. Who determined that that class action, the Rudd class action I'm referring to, should be a non-opt-out mandatory class?
A. That's something that the insurers insisted upon.
Q. And the insurers, you mean Continental and Pacific?
A. Uh-huh.
Q. Did --
A. In any event, I'm having a difficult time understanding how we would settle the insurance coverage case with respect to some members of the class but not other members of the class. I can't imagine that that would have been an acceptable situation to Fibreboard. So I do need to amend my answer.
Q. Would you agree that the trilateral agreement in fact and in effect legally is a surrender of the policy for the sum that you have negotiated with Fibreboard?
A. I -- I think it wouldn't be -- it would not be unfair to so characterize it.
Q. Having agreed with me to that, are there any particular procedural difficulties that the insurers and Fibreboard considered at

the time of the negotiation of the trilateral with respect to affecting a surrendering of the policy?

A. Mr. Krispin, are you asking me to state for the record what areas of -- what legal issues were areas of concern for us in terms of getting the trilateral effected? Because if you are, I think I'd have to look to my counsel for direction as to whether he's comfortable with my giving you a detailed issues list or not. I would hope that he is not.

[Laughter]

Q. Having said that, would you look to your counsel?

MR. WACHTELL: Counsel was sitting quietly because counsel did not understand the question to be calling for that. If the question does call for that, counsel most definitely objects on the grounds of work-product privilege, Your Honor.

MR. KRISPIN: My response to that, Your Honor, is that it goes to -- the question asks for information that goes to the propriety, legal propriety and fairness of the trilateral agreement. And I think it's germane, and I don't see that there's any work-product privilege that can be asserted.

THE COURT: I sustain the objection and announce the afternoon break.

[Recess]

MR. KRISPIN:

Q. Prior to the break, Mr. Koplow, I asked you to disclose your work-product privileged information. I will not ask you to do that, particularly in light of the court sustaining your counsel's objection. But what I do want to know is, what was the reason behind the formation of a class action styled Rudd or Continental v. Rudd? What was the necessity of the class action?

A. Why did we do that?

Q. Yes.

A. We did it because if we were going to pay the billions of dollars that were involved, we wanted to know that we had a judgment that would be binding on people who may in the future seek to bring claims directly against the insurers if the fund ran out.

Q. What particular body of law was considered as being relevant to effecting a binding settlement on future class?

MR. WACHTELL: At this time, I don't need the witness to tell me I need to object, Your Honor. I object to work-product privilege.

THE COURT: I think you are treading on that, counsel.

MR. KRISPIN: Thank you.

Q. You are familiar with the Rudd complaint, are you not?

A. I was familiar with the Rudd complaint when it was -- when it was filed last June. I don't have -- I don't have all of the details of the complaint clearly in focus at the moment. But I'll do what I can to answer your questions.

Testimony of John Leubsdorf, legal ethics expert Tr. 1753-1760

A. I have two -- two sets of opinions. One is that these lawyers should not have been negotiating this particular settlement for the so-called futures class at the same time as they were representing present clients in other matters. And the other is that there were conflicts of interest within the class such that there should have been lawyers to represent both sides of those conflicts involved in negotiating the settlement.

Q. All right. With respect to the first portion of your opinion regarding a conflict of interest between present claimants and future claimants at the time of the negotiations, can you tell me what factors you took into account in reaching that opinion?

A. Okay. I've taken into account a number of factors. First of all, this is a very large case, huge amounts of money involved, very large numbers of people involved, and a case very important, of course, for all those people. This is a case in which it's well worthwhile to have conflict-free representation. Now, also, there seems to be a real possibility in this case, substantial possibility as of the time the negotiations were going on, that there would not be

enough money to pay fully all of the -- the claimants that were likely to appear, including the present and the -- and the future. I base that on, on one hand, the great uncertainty as to how many and how large the claims were going to be; on the other hand, the uncertainty as to how much money was going to be available So that the result is that these two groups of claimants, the present and the future claimants, have interests that are in conflict as to gaining as large a proportion as possible of whatever sum of money or sums of money were ultimately going to be made available. And in addition, I consider that this is not a case in which one can rely on members of the class and the class representatives to protect the interests of the -- of the class members. The class representatives -- first of all, a lot of members of the class are, to a considerable extent, unidentified. These aren't people who know they have claims, who have already asserted claims, they are almost by definition people who have not yet asserted or settled claims, and therefore they can hardly be expected to take a very active role in maintaining and defending their own interests.

The class representatives would also have problems here. This is an extraordinarily complicated matter, you have to be very sophisticated and put in a lot of time to understand what the issues are. The class representatives, as far as I can tell from the depositions of the two of them that I have read, did not put in that time. In fact, most of the negotiations occurred before they even were designated as class representatives. And the negotiations were, as I understand it, substantially completed before they were told the resulting terms, so that their function was merely to come in at the end and approve what had already been done by other people. I see no indication that the conflicts were placed in front of them and they were told about them, that they were asked to provide any kind of informed consent.

Q. Any other factors that you took into account in rendering this first portion of your opinion?

A. Those are all the ones that occur to me at the present. Oh, no, I think that it seems to be there are alternatives available; that

is, it would be possible to provide representation that could not have these problems either by having the lawyers involved settle their cases, their present cases, before they got into the negotiations, as indeed the court at one time urged them to do, or, alternatively, to appoint lawyers who didn't have present cases pending to be all or some of the class representatives.

Q. Going back to one of the first bases that you have expressed for this portion of your opinion, you state that there is a possibility that the funds to be obtained might not have been enough to pay both groups of claimants; that is, the presents and the futures. Can you flesh out for the court what the basis for that belief is?

A. Okay. On the one hand, we have, as I stated, the uncertainty in the number and size of the claims. There have been attempts made to predict those claims. I gather that those attempts are -- are divergent. Attempts have been made in the past to predict asbestos claims which have not been all that successful. It's hard to know how many people will develop various kinds of diseases, especially the noncancer diseases; it's hard to predict how many of those people who do develop the diseases will assert claims; and, of course, it's hard to predict how the legal system in 30 years, say, is going to value those claims. So this isn't a question of anyone making a mistake, it's just an inherently difficult thing to do, I'd say an inherently impossible thing to do with any particular accuracy.

On the other hand, you have the amount of money available. Now, the only thing that, as the negotiations got underway, you knew for sure about the amount of money available is that Fibreboard had a certain amount of assets which were universally agreed to be insufficient to pay all the claims.

In addition to that, there was the possibility of getting money from the insurance companies. That depended upon one of two things: either Fibreboard winning ultimately in the California Supreme Court its coverage case or, alternatively, a settlement being reached. And, of course, it was impossible to predict

at the outset of the negotiations whether Fibreboard would win its coverage case or, if there was a settlement, how much money would be made available. So that you simply couldn't know what the funds would be, but you could know that it would be very far from infinite and that you would need a very large sum of money indeed to pay all the claims that might ultimately be expected to be asserted.

Q. And if the result of that possibility that there might not be enough money to pay both groups of claimants in full, would that mean that there was also a possibility that the two groups were competing for the same dollars?

A. I think it's more than a possibility. Once there's the possibility that the money will not be enough, a substantial possibility, then a responsible lawyer representing either of these groups has to reckon with that in his or her negotiations.

Q. At this point, Professor Leubsdorf, I'm going to read you a portion of the depostion testimony of Professor Hazard and ask you some questions regarding it. The deposition testimony at page 155, beginning at line 4, Professor Hazard states: I assume that anybody who confronts an obligation that doesn't have a boundary set on it by external events such as an in rem proceeding has a sense of his reserved price, that there would be an amount at which they would think the demands considered as a whole or considered separately wre not worth trying to settle for. So in a sense, you're asking a question, is two and two four? And the answer is: It usually is. That is, it is in the nature of the strategy of bargaining that a defendant will have a reserved price. It is also in the nature of bargaining that it is purely an analytic exercise to state in advance before the party makes a final decision what the reserve price is. Even in the case of somebody giving instructions to go to an auction, the person who is the agent making the bids can seek additional instruction if the circumstances warrant. So I think you are putting a question that is typically put in economic discussion but not by sophisticated economists on the

question of whether a reserve price preexists the decision to settle. I don't think it does.

Then skipping down to page 157 of the same testimony, Professor Hazard was asked the question: So the amount that was available here was not limited in any way?

Answer: Not by some external event, no.

Tell me, Professor Leubsdorf, do you agree with the statements by Professor Hazard that I just read from his deposition testimony?

A. I do. In fact, I would go a little further. I would say even if CNA, for example, had concealed within it some sort of definitive reserve price, there was no way in which the plaintiffs' lawyers knew that or knew what it was. So they had to proceed on the assumpion that it was not clear how
much money they were going to get.

Q. Does that change your opinion in any regard with respect to the conflict here between present and future clamants?

A. No. because my opinion isn't based on assuming that there was some definitive fixed amount, dollars and cents, that was the absolute limit, but simply that as the negotiations began and continued, there was a substantial possibility that CNA would not agree to put up or would not be required by the courts to put up enough money to pay all the claims. When I say CNA, I mean, of course, Pacific as well.

Q. Are you familiar generally with what has been referred to as the Ness Motley settlement that was negotiated in 1993?

A. I have looked at it.

Q. And you're aware that as part of that settlement, the present claimants who benefitted from it received contingent -- part of the payment that they were to receive was contingent on some future events occurring?

A. Right.

Q. What is the significance to your analysis of those contingent back-end payments to the present claimants of Ness Motley?

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class, but the conflict still existed. Their needs to the present clients were the sam immediatly after the appointment as they had been before the appointment. And indeed you have beginning before that but continuing after that even reminders of the interdependence of these two procedures that can be seen in correspondence and materials relating to the negotiations.

Q. What body of law do you rely upon in offering the opinion; that is, the first portion of your opinion regarding the conflict between present and future claimants?

A. Well, I'm relying basically on the law relating to conflicts of interest, which I consider to be relevant in a Rule 23 context because it's related to adequacy of representation. And the law relating to conflict of interest dervices from various sources. The two most obvious are, on the one hand, the rules that have been adopted in the various jurisdictions and, on the other hand, the common law or the precedential cases have been decided by courts usually in motions to disqualify but in other contexts as well.

Q. You referred to the rules that have been adopted by various jurisdictions. Is it fair to say that most of those jurisdictins have adopted some form of what's known as the Model Rules of Professional Conduct?

A. I believe that's now correct, yes.

Q. And do you believe provision 1.7(b) of the Model Rules of Professional Conduct is implicated in this case?

A. Yes.

Q. Could you read to the court the first portion of Rule 1.7(b)?

A. Let me find it. Okay. A lawyer shall not represent a client if the representation of that client may be materially limited by the layer's responsibilities to another client or to a third person or by

the lawyer's own intrests, unless -- and then you come to the expectations.

Q. Okay. What, in your opinion, do the words "may be materially limited" mean in the context of Rule 1.7(b)?

A. Well, in my view, they call upon whoever is approaching the issue to make a -- a judgment as to whether there is substantial likelihood of this kind of limitation likely. It's necessarily a matter o prediction. May be. Because this decision is to be made before accepting the representation. So you

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the beginning of the representation, when there weren't even any named plaintiffs as yet named. And there's at least the possibility that if the named plaintiffs refused to consent that the court could itself look at the situation and determine that the consent should be issued, as it were, for the class, with due regard to the fact, of course, that these are other people, that they're individuals who presumably know their own interests better than any court is likely to, and so it's not the same thing as someone consenting for himelf or herself, but, rather, a somewhat different situation.

Q. Assuming again that the laywers had proceeded under a reasonable belief that the representation would not be adversely affected, when in the context or this case do you believe the constructive consent, so to speak, that you have just described by the named plaintiffs and the court would have to have taken place in order to effectively waived the clause?

A. Well, what the rule contemplates, of course, is that it is to occur before the representation begins. There could be an enhanced stand of five minutes, an hour, or perhaps even longer than that, but I think the substantial point is that consent should occur before significant negotiations begin.

Q. Earlier you told the court that one of the factors that you have taken into account in identifying a conflict between the present and the future claimants is that there were practical alternatives available.

A. Right.

Q. Including appointment of other lawyers who did not have the present asbestos clients. Correct?

A. Yes.

Q. Now, what is the basis -- I take it that you believe other lawyers who did not have present asbestos cleints could be competent to provide adequate representation to the future claimants.

A. Yes.

Q. And what's the basis for that?

A. Okay. Well, obviously, it's a good thing for lawyers who are trying to settle this case to know a substantial amount, a great deal about asbestos litigation. And lawyers who already have that knowledge begin with that knowledge. On the other hand, the knowledge can to some extent be acquired. I think it's routine nowadays for firms, especially larger firms, I suppose, but also smaller firms, to get involved in new areas of law that they

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in -- in -- in settling this case.

Q. Now, from your reading of various materials that you have already described to the court, have you become generally familiar with the involvement of the law firm of Caplin & Drysdale in the negotiations for this case?

A. I have.

Q. And are you aware or have you become aware that the time that this was negotiated and continuing to today, the Caplin & Drysdale lawyers who were involved have not and have never represented individual asbestos claimants?

A. That is my understanding, though they had been involved in certain proceedings that involved asbestos.

A. Now, in your opinion, did their presence and involvement in the negotiations on behalf of the future class remove the conflict or the problem created by the conflict that you described?

A. No, I don't think it did.

Q. Why not?

A. Well, because they were not the lawyers representing the class. They were the lawyers representing or providing legal services to the lawyers representing the class. They were not authorized to make decisions as to what was going to be signed and what was going to be accepted, and certainly not to make them all by themselves. It was the lawyers who were, I suppose, first approached by Fibreboard and later designated by -- by the court who were the ones who were in charge. So that it was those lawyers who had to be free of conflict. And it doesn't do any good if they -- the lawyers who are in charge of a case have a conflict, that they have working for them a certain number of lawyers who are not subject to that same conflict.

THE COURT: Doctor, if the court's initial reaction to your testimony is the opinion that if inexperienced, competent plaintiffs counsel -- by inexperienced, I mean in the trenches of the asbestos cases -- had been designated by the court to negotiate for the future class in this case, it would have resulted in an economic benefit to the insurers of several hundred million dollars as compared to the number negotiated in this case. Whether that's true or not is not the question.

THE WITNESS: Sure.

THE COURT: Assuming that that's true, as that, in your judgment, simply a price one has to pay as a result of your view of the ethical considerations, and in the priority between those two you place the higher priority on ethical consierations, or is there also a concern that the courts have to deal with of equal importance, and that is adequacy of representation?

THE WITNESS: Adequacy of representation is certainly the issue. But I would say that even if the court were to reach the conclusion that Your Honor is describing, there's still the possibility of having the class represented by lawyers who do have asbestos experience but have settled their present cases, or perhaps by some combination so that you could bring both kinss of events to bear.

THE COURT: So the court, in your judgment, would have had the task of finding lawyers who had some familiarity with asbestos cases but had either gotten out of the business or didn't have enough of them to have any ongoing business?

THE WITNESS: I'm not sure I would say the court has the obligation. Normally when a class action is brought, the plaintiffs come into court and say, "This is the representation we propose." And the judge has to decide whether it's adequate or not. Now, some judges certainly have gotten involved actively, and I think that's perfectly proper, in finding --

THE COURT: Well, the chronology of this case was that the settlement facilitator made a recommendation that the time has now come where the process is best served by the appointment of counsel to represent the futures class.

THE WITNESS: Right.

THE COURT: So the court had to decide at that point who.

THE WITNESS: Right.

THE COURT: Or whom. I never can get those straight. And that places primary responsibility on the court at that point, does it not?

THE WITNESS: It places certainly the responsibility of deciding whether the proposed counsel are going to be adequate or not.

THE COURT: So if it comes down to balancing the interests of adequacy of counsel with the possibility of some ethical compromise because there's been dual-track negotiating, you

would say the ethical compromise should have precedence over adequacy of counsel?

THE WITNESS: No, I wouldn't put it that way. The adequacy of counsel is a prerequisite. The court can never -- should never certify a class action unless there's going to be adequate representation. And representation can be inadequate for several reasons, one of which is imcompetence, and another of which is a conflict of interest, and it seems to me that both of those requirements are required by Rule 23 to be satisfied before a class action is approved.

THE COURT: So then we come down to the question of prejudice, don't we?

THE WITNESS: Yeah.

THE COURT: And ultimately this question will resolve around whether the futures class members were better served or were prejudicated by the court's decision on appointment of counsel?

THE WITNESS: Yeah.

THE COURT: Fair statement?

THE WITNESS: Yes, It's a relevant issue.

MR. BAUGHMAN:

Q. Following up on the court's questions, Professor Leubsdorf, have you been asked in the context of rendering your opinion in this case to offer any opnion regarding the fairness of the

substantive terms?

A. No, I haven't.

Q. I'm going to ask you to assume for purposes of this question that the substantive terms of the settlement are in fact very fair to the class members. Assuming that, does that fact change any of your opinions?

A. If the conclusion is yes, that is a reasonable, fair settlement the court would ordinarily approve, assuming there were no conflict problems, no, that doesn't affect my result.

Q. Can you tell the court why not?

A. Well, because the plaintiff class is entitled not just to a settlement -- a result somewhat within the bounds of reasonableness, they're entitled to a settlement reached by properly-designated, by properly-representative and vigorous counsel. There are all sorts of possible results that could have been reached in a case like this. It's virtually impossible after the result to go back and say, "Well, if there had been conflict-free counsel, they would have done X dollars better." That's one reason why we have conflict rules, because of the fact that conflicts may influence behavior, but it's not too easy to figure out afterwards to what extend they have. So the only way to be sure that you have gotten what the class is entitled to, or virtually the only way, is to -- is to have proper counsel representing the class to begin with.

Q. Let's move on to the second portion of your opinion now, what I believe you described as conflicts amount the class members themselves. Can you describe for the court the first group of class members that you believe had conflicting interests?

A. Yes. This class contains two groups of claimants, among others, the so-called post-'59, 1959, claimants, and the pre-1959 claimants. Now, these were not - these groups had been, as it were, designated by the past history of asbestos litigation because the post-1959 claimants, as a result of the insurance situation, Fibreboard, were getting and were probably entitled to get much smaller amounts than those who were the pre-1959 claimants. Now, as you get to the situation of drafting a settlement, the interests of those two groups can come into conflict. The post-1959 claimant would not prefer to be treated on the same terms as the others, but if that's to be done, probably some concessions have to be made as far as treatment for the other claimants. So that someone has to pay for it and it's apparently

interests, quite large groups, I'm sure, in both cases.

A. And you can explain to the court why those two groups have conflicting interests?

A. Yes. The people who are not going to be injured for some time have an interest in making sure that the trust will be able to pay them when their injuries occur. And in order for that to occur, they have an interest in securing measures that will cut down the average size of payments in order to make sure that enough money is left for them. The settlement already has embodied some of these arrangements. There could have been more, I suppose, but there are already some of them. They're so-called spendthrift provisions of the trust. Provisions that there will be no prejudgment or post-judgment interest. There are provisions about damage caps, punitive damages.

On the other hand, the people who have already been injured and were going to present their claims within a rather short time, they would, of course, have an interest in -- in getting compensation that they would otherwise have expected to get in the court system, which would have included, for instance, prejudgment interest, some of the other type things I mentioned.

So that there is this conflict. It can be resolved in many different ways. There are various compromises that can be worked out. But in working out that compromise, the parties affected should be represented. That's why there should be separate lawyers representing each of those interests.

Q. I forgot to ask you, moving back to the second conflict within the class that you identified -- that is, conflict between those individual class members who might be represented by counsel who are a part of the SCB and those who are not -- how, in your opinion, should that conflict have been resolved?

A. Well, I think in this case there are any number of ways in which that conflict could have been removed. First of all, you

could, of course, have had negotiating counsel who had agreed in advance that they would not serve on the SCB.

Secondly, you could have agreed that you would not have all the clauses governing the SCB that I referred to; that is, you could have said that members of the SCB may not represent individual claimants, that that would be part of the -- put it in early in the negotiations that the lawyers who

Testimony of John Leubsdorf, legal ethics expert Tr. 1791

Q. Professor Luebsdorf, let me just take a few minutes about your own experiences. You testified at the deposition that up until this case and your being retained as an expert witness n this case, you had never testified before in any mass tort case; is that correct?

A. That's correct.

Q. And you had never testified, therefore, in any case involving asbestos; is that correct?

A. That's correct.

Q. And indeed you had never been consulted before being retained in this case in any matter involving mass torts or asbestos. Correct?

A. I'm not sure if that's true. I have written an amicus brief in an asbestos case. I don't know if you call that being consulted. And I've -- I think some of the services I provided in other contexts have in fact involved mass tort cases.

Q. Well, take the amicus brief for a moment.

A. Right.

Q. Are you referring to the Georgine matter in Pennsylvania?

A. That's correct.

Q. And you filed an amicus brief in that case, is that correct?

Testimony of John Leubsdorf, legal ethics expert Tr. 1793-1794

Q. At the time, I believe you testified a few weeks ago, Professor Luebsdorf, you indicated that you had formed your tentative opinions in this matter before you had read all the depositions; is that correct?

A. I had started to form tentative opinions before having read all the deposition of the -- I've read at least one or two depositions since I spoke at the deposition.

Q. But is the answer to my question correct that before you formed your tentative opinions or at the time you first formed your tentative opinions, you had not read all the depositions? I believe you specifically said you had not read Mr. Cox's and Mr. Rice's depositions.

A. No. I don't think that's what I recall saying. What I recall saying is that at that time I -- I did have -- you know, I did express opinions. Well, maybe it is. I'm not sure what you mean by tentative opinions or what I mean by tentative opinions. I started forming opinions before having read Mr. Cox's deposition on the basis of other documents and representations that were made as to what I would find when I looked at the matter. As time went on and I read more documents, I have become less tentative.

Q. In fact, you formed your tentative opinion, sir, I believe you testified, around the time of the meeting you had with Mr. Baron and Mr. Baughman on November 29th, in New York, which was before Mr. Cox and Mr. Rice had testified. Correct?

A. I think I had some tentative opinions at that time, though I couldn't recall exactly what I said to them at that time.

Q. Have you ever published any articles dealing with asbestos or mass torts?

A. No.

Q. Have you ever published any articles addressing the application of Rule 1.7, the ethics rule, in the context of class actions?

A. No.
Q. Have you ever been personally involved in negotiating to completion a class action settlement?
A. I would say not, except in the sense that I have negotiated agreements as to significant issues in the class action. But it was not a general settlement. It was far from a general settlement.
Q. And it wasn't to completion in the sense of having a completed settlement, is that correct?
A. Well, in the course of litigating a class

Testimony of John Leubsdorf, legal ethics expert Tr. 1796-1797

that correct?
A. At that time I had more familiarity --
Q. At that time begin when you taught at Berkeley?
A. No. I mean when I gave my testimony before I had read through the Texas Rules, I had more familiarity with the California rules than the Texas Rules.
Q. Are you aware of what the California rule is with respect to settlements in the class action area?
A. No.
Q. You're not aware that the comment in consent class action in California is specifically stated under in the corollary to Rule 23?
A. No, I'm not. I'm not even sure if I'm aware of comments to the California rules in that matter.
Q. Are you aware, sir, of the local rule 3 of the Eastern District of Texas applicable to ethics rules?
A. No, I'm not.
Q. Now, you indicated in your testimony this morning that you know Professor Geoffrey Hazard by reputation and that you respect his work. Do you recall saying that?
A. Yes. By reputation and personally.

Q. Indeed, isn't it correct that you have no reservations whatsoever as to Professor Hazard's credentials as an expert in professional ethics and professional responsibility?
A. I have no doubt that he's qualified to testify as an expert.
Q. And you have no reservations at all in saying that, is that right?
A. None.
Q. Now, Ortiz exhibit 11 was handled to us this morning, and it is a list of the documents that you consulted. Do you have a copy of that, sir?
A. No, I don't.
MR. BSCHORR: Do we have another copy?
MR. BAUGHMAN: I think the only other copy, Mr. Bschorr--
MR. BSCHORR: Could we have the court's copy given to the witness, please, with Your Honor's permission?
THE COURT: Certainly.
MR. BSCHORR: Ortiz 11.
MR. RICE: Was it an exhibit to the deposition?
MR. BSCHORR: No.
Q. I hand that to you, sir.
A. Thank you.
Q. Does Ortiz exhibit 11 comprise a complete list

Testimony of John Leubsdorf, legal ethics expert Tr. 1805

approving settlement?
A. I don't recognize it, no.
Q. Is it your opinion that all members of the class must be identical interests --
A. No.
Q. -- or they need separate representation?
A. No. That's impossible.
Q. You recognize that there can be differences, I take it.

A. Yes.
Q. When Mr. Baughman inquired before of the basis of your opinion, at one point you and he were discussing 1.7(b)--
A. Right.
Q. -- of the model rules. Do you recall that?
A. Yes.
Q. Am I correct that it's your opinion that 1.7(a) is not applicable to this situation?
A. In my opinion, it's not.
Q. So what we're dealing with here is 1.7(b), is that correct?
A. And to the some extent 1.8(g) has some relevance.
Q. That's the aggregate settlement issue?
A. Right.

Testimony of John Leubsdorf, legal ethics expert Tr. 1807

witness?

MR. BSCHORR: I'm about to, Your Honor.

THE COURT: Any objection to Pacific 1? Admitted.

MR. BSCHORR:

Q. Now, Mr. Leubsdorf, that's draft No. 4 of the restatement of law governing lawyers, is it not?
A. Tentative draft No. 4, yes.
Q. Tentative draft. Okay. If you look at the second page, section 201 --
A. Right.
Q. The basic rule, prohibition of conflict of interest, do you see that?
A. Yes.
Q. Do you see where it says, in the second sentence, in the bold, a conflict of interest exists if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or the lawyer's

duties to another current client, former client or third person? Do you see that?
A. Yeah.
Q. And as I understand your opinion, it is your opinion that this conflict exists because of the

Testimony of John Leubsdorf, legal ethics expert Tr. 1808-1810

relationship between the lawyer's representation of the client and the lawyer's representation of another client, i.e., the present and future situation. Is that correct?
A. That's correct, yes.
Q. Nothing else under this rule or Rule 1.7 is affected by your opinion, is it, or implicated? Other than the relationship between the presents and futures that you discussed.
A. Well, I suppose the second group of conflicts I discussed would also fall under this provision, because a general provision -- there are more specific provisions later on in this chapter.
Q. Now, substantial risk. What is your understanding of those words?
A. Well, I would say they speak for themselves pretty well. It means that it has to be more than just a possibility or a faint risk or a slight risk, it has to be -- there has to be a balancing process that goes on as to the extent of the risk and the extent of the harm.
Q. Has to be a significant and plausible risk, even if not probable? Do you agree with that?
A. That's okay, sure.
Q. Would you agree it requires a greater showing, ...then, that the effects may occur or the mere possibility that they occur?
A. A greater showing than what? You mean there has to be a greater showing than the mere possibility?
Q. Yes.

A. Well, I don't know. It depends what you mean by "mere," I suppose. You could never go beyond showing a possibility, because you can't -- you don't wait until the events actually -- the consequence actually can be proved. You're always dealing with possibilities. But the question is the extent of the possibility. And substantial is as good a word as anything. A substantial possibility, not just a mere possibility.

Q. So it needs to be a more than a mere possibility, in your opinion?

A. Yeah.

Q. Now, the word "materiality" appears in 201. Do you see that?

A. Yes.

Q. Must be materially and adversely affected.

A. Right

Q. What is your understanding of the word "material"?

A. Well, it means that the effect would not only be adverse but adverse -- but have a certain size, a certain -- certain extent. In other words, a client might be adversely influenced by settlement being put off for five minutes. That is adverse, but it's not material. But if you deal with a possibility that the client will get, say, a sizable percent less money, that would fall very clearly on the other side of the line, that's both adverse and material.

Q. Let me ask you a little bit about your understanding of these negotiations. We've talked about the words, and I know during the deposition in New York we talked about the concept of a global settlement. I believe you testified at that time that you believed that this conflict between the presents and futures began in 1991, when you said global discussions began. Do you recall that testimony?

A. Yes.

Q. Is that still your view here today?

A. Yes.

Q. So your view is that this conflict lasted for about three years?

A. From sometime in 1991 to sometime in 1993, when the agreements were signed.

Testimony of John Leubsdorf, legal ethics expert Tr. 1817

Q. It's a treatise that is used in our profession, is it not?

A. It is, yes. And by the Supreme Court, I believe.

Q. The definition of collusion, as appears in Black's, and let me read, an agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law. Do you agree with that definition, sir?

A. That's certainly one way in which the word is used, yes.

Q. In your review of the records here, do you see anything in these negotiations that were collusive, as that word was just defined?

A. I wouldn't say so.

Q. In fact, you agree there was none; is that right?

A. I said I didn't see anything. I can't really say what was or wasn't. I assume that if there had been collusion, it would not be written out in a document.

Q. Let me talk a little bit about your views of what has been sometimes called a settlement class action. Do you have an understanding of those words?

A. Yes.

Testimony of John Leubsdorf, legal ethics expert Tr. 1826-1827

on the payment of a global settlement, like Ness Motley.

Q. You are aware, are you not, sir, indeed I believe you acknowledged at your deposition in New York, that these four class counsel are all expert experienced counsel in asbestos?

A. Yes.

Q. You have no limitations on that, do you?
A. Not the slightest reason to doubt it.
Q. Indeed, you are aware that Fibreboard viewed and the record in this fairness hearing so indicates that Fibreboard viewed these four counsel as their principal adversaries in the asbestos litigation business?
A. I don't recall seeing that particular statement, but I have seen what they regarded --
Q. I take it the reason you don't remember is because you didn't read yesterday's transcript.
A. That's probably why.
Q. And you are aware, I take it, that Mr. Kazan himself has a practice that I think in his words in his deposition and certainly in the courtroom were focused on mesothelioma patients, claimants who had suffered the highest, most severe form of an asbestos-related disease?
A. Yes.
A. And you are aware that Mr. Kazan and Mr. Wartnick were viewed not only by Fibreboard but by other counsel in the asbestos -- other plaintiffs counsel as being experts in dealing with Fibreboard, having had many cases, many skirmishes, many battles with Fibreboard?
A. Yes.
Q. And you are also aware that Mr. Cox and Mr. Rice are from the firm of Ness Motley, which has a national practice involving asbestos claimants? You're aware of that?
A. Yes.
Q. For many years they've been assumed to be one of the foremost counsel in the asbestos business?
A. Yes.
Q. Do you agree that the courts, in considering the issues that you presented your opinions on, should take a practical approach in resolving them?
A. Yes.

Q. And you agree that practicalities always count even in ethical matters?
A. Yes.
Q. Let me ask you a couple of questions concerning the opinion between presents and futures that you

Testimony of John Leubsdorf, legal ethics expert Tr. 1876-1877

Q. I believe you testified at your deposition that you were unaware of any significant negotiations by class counsel between August 27th and October 12th, while this trilateral was being negotiated between the insurers and Fibreboard. Do you recall that?
A. I'm not sure if I said that or not.
Q. We'll come to that in a minute.
Do you also recall that on October 13th, in your words, the conflict between the presents and the futures had been substantially reduced, perhaps eliminated by that point?
A. I don't remember if I -- I said that, but it seems a plausible statement in view of the signing of the trilateral.
Q. Let me refer you, sir, to the answer you gave at page 478, line 11, which is in the middle of your answer. I'll read the whole part, if anybody wants me to, but I'm only interested in the last sentence.
In the case of Ness Motley, I have seen that, and I would say the conflict had certainly been very substantially reduced, perhaps eliminated, by that date.
The record will reflect we're talking about October 12th.
A. Okay.
Q. Okay?
A. Yeah.
Q. Now, I take it any negotiations thereafter with respect to the terms of what ultimately became the global settlement which

was signed on December 23rd are not affected, in your view, by the present/future conflict you've been discussing.

A. Well, you would still have one part remaining; that is, that these lawyers would still have an interest in the implementation of the Ness Motley agreement for their clients. But that is certainly a lesser conflict than the one we've been discussing. And if that had been all there were in this case, I don't know that, you know, I would be reaching the conclusion I did.

Q. Right. Indeed, the issues of both would have the same interests in this proceeding, wouldn't they?

A. I'm not sure that the Ness Motley claimants would care very much one way or the other once there was a trilateral, because that would trigger their recovery of the second 50 percent, if I recall correctly.

Q. Because the trilateral required court approval which hadn't been obtained yet.

A. Okay. They would have an interest in court

Testimony of John Leubsdorf, legal ethics expert Tr. 1891-1994

Q. Very well, I apologize.

A. As between those two groups, they have different interests.

Q. And why is that?

A. Because the -- those who are post-'59 would like to get compensated not at the level which has historically been available but at a level which is comparable to the terms available to pre'59 claimants. Pre-'59 claimants, on the other hand, to the extent that the fund may be inadequate, want to make sure that more money is going to be available to pay people in their group. And therefore they would tend to support the position that the post-'59 claimants should not get identical benefits to theirs.

Q. Do you have any understanding of how this pre '59, post '59 dichotomy came about?

A. Yes.

Q. What is your understanding?

A. My understanding is that the insurance coverage of Fibreboard is, of course, disputed to begin with, was, however, very severely limited even in the most optimistic assessment as to the post-'59, so that there was no reasonable likelihood that the funds available to Fibreboard from insurance and its own assets would be enough to pay those people, whereas the case of the pre-'59 claimants, if Fibreboard got enough money from the insurance company, it would then be able to pay them the full amount that they might expect to recover in the tort system.

Q. And is it your understanding that that situation that you just described continued all the way through the negotiations?

A. At some point it became clear that at least some money would be available to pay post-'59 claims from the insurance companies, but I don't remember the exact date on which that occurred.

Q. Did you ever read the Pacific/Fibreboard agreement of March 1992?

A. No, I did not.

Q. It's not on your list.

A. No, I didn't.

Q. Did you ever read the April 9th, 1993, agreement between CNA and Fibreboard?

A. No.

Q. So you don't know whether or not those two documents have any relevance to this issue, is that right?

A. That' absolutely true.

Q. And if I told you that those documents ...equalized, if you will, the playing field and made it clear that both pre- and post-59 claimants were going to be treated the same, would that change your opinion?

A. I'm not sure. I would have to think about it a little bit more, because I would want to know the terms on which they were all being made the same. That is, suppose we imagine an agreement which says "Okay, we're making a billion dollars available and it can be used to pay both pre- and post-'59 claims, but still it's only a billion dollars." At this point, there still might be a conflict between the pre- and post-'59 claimants. The pre-'59 claimants might come to Fibreboard and say, "Okay, now you have the money, but it's not enough for all of us. And the traditional pattern of settlements has been that we got more because insurance coverage was doubtful, and we still should get more." It's possible they would say that. Maybe they wouldn't. Maybe they would say, "Okay. Let's treat everyone equally."

Q. You're not familiar with the terms in the 1993 CNA-Fibreboard agreement which provides that any global settlement will be done entirely within the proceeds from insurance without distinction whatsoever between pre-'59 and post-'59?

A. No. and I -- I -- if it's as you describe it, it means that as of that date there still was no insurance money available from CNA to pay the post -'59 claims, only that there might be if a global settlement were agreed on. I still have the question what the terms of that global settlement should agree on. And as to those terms you could still have a disagreement.

Q. On November 12th, 1993, when the trilateral was entered into, there now was money available. Right?

A. Right.

Q. You have read that document, haven't you?

A. I'm not sure I have, actually.

Q. Oh, you haven't even read that one?

A. I think I read parts of it and I read a description of it.

Q. Well, are you aware in that document, the trilateral, that there is no distinction between pre- and post-'59 and the use of the money that is committed under that agreement?

A. I was unable to find anywhere in the documents a statement that there was to be a distinction. But I also had trouble finding there was not to be a distinction, not in the settlement agreement itself or in the trust agreement itself

Testimony of John Leubsdorf, legal ethics expert Tr. 1895

but in the notice of settlement. But it might be considered to be ambiguous. As I say, I didn't find any such agreement in the settlement agreement or the trust or the -- the -- the documents that came along with the trust.

Q. Okay.

A. I -- I -- I didn't look for it in the trilateral agreement. I'm not sure what effect it would have in the trilateral agreement proceeding under the trust. I assume it would be governed by the trust document but not by the trilateral.

Q. Let's talk a little bit about the SCB for a minute, which is the second part of your opinion, second half of your opinion.

A. Right.

Q. This is not a subclass issue either, is it, in your view?

A. I haven't advanced it in those terms, no.

Q. You advanced it in the terms of something that is unfair for claimants who might go to one of the four class counsel getting an advantage over others who do not go to those counsel?

A. And therefore a conflict resulting between those two groups of people, yes.

Q. Those two groups of people who sitting here

Testimony of John Leubsdorf, legal ethics expert Tr. 1909-1911

A. Well, there are several options. First of all, if the defendants -- that is, Fibreboard -- was really anxious to negotiate a

settlement of this sort, they would make it their business to make sure that the plaintiffs' lawyers were offered settlements that they could accept on behalf of their clients.

[Laughter]

A. If that were not to be done, you would have two possibilities:

One is that you would proceed with counsel, as I've said before, who did not have prior litigation experience.

Or the other is that you would not have those kinds of settlements.

Now perhaps you might say, you know, you imagine that there is absolutely nowhere in the world any lawyer to be found who is free of conflict and able to undertake settlement negotiations, and that such lawyers cannot be produced by settlement negotiations on the present claims. Well, I don't know what I would say then. But I have no reason to doubt that you could find competent and conflict-free lawyers by one of the several methods that I have suggested.

Q. Now, you talked about the fact that there ought to be counsel representing different interests within the class, is that right?

A. Yes.

Q. But you don't characterize those different interests as subclasses?

A. I -- you can characterize them as subclasses or not. But speaking of subclassing suggests that the class is to be divided up into watertight entities, each of which is to be separate and is to have its own representation. That is one thing the courts have sometimes done. I don't think it's necessary to be done here. You might disagree and say there should be subclassing and therefore there should be eight lawyers or eight sets of lawyers. I don't think it's necessary, but, as I said, it could be done, that is one approach the courts have sometimes used.

Q. If you don't have subclasses, how are you going to define the roles of each of the lawyers?

A. By saying to the lawyer: "You, Mr. or Ms. A, are to represent the interests of the post-1959 claimants in getting the best possible benefits; and, you, B, are to represent the interests of the pre-'59 claimants; and you, C, are to represent the interests of those people in the class who have already suffered legally cognizable harm; and you, D, are to represent the interests of those who are not; and furthermore, of you, A, B, C and D, B and D are to agree in advance that you will not serve on the SCB. That's one way you can do it. But obviously there are different ways.

Q. If you had a post-'59 person who had a legally cognizable injury and another post-'59 who didn't have one, would those two folks require separate counsel to represent their varying interests?

A. They would have separate counsel to represent that particular varying interest in forms of lawyers C and D.

THE COURT: Counsel, we've approached the time that I have a better deal.

MR. KAPLAN: Okay.

THE COURT: And we will resume at 1:00.

[Lunch recess]

MR. KAPLAN: May I proceed, Your Honor?

THE COURT: Yes, sir.

Q. Professor Leubsdorf, before lunch we were talking about the fact that Justice Higginbotham had

present clients outside the settlement?

Q. Yes.

A. Well, that would certainly remove the first problem that I was concerned about. It wouldn't deal with the other conflicts within the class, of course, but it would --

Q. As you've alluded to before, you're aware of the fact that the reason that the futures deal was negotiated separately as a futures deal was at the suggestion of Judge Higginbotham. Correct?

A. I remember that he did suggest that, yes.

Q. And you believe that he was wrong in making that suggestion?

A. It seems as if it was a good suggestion from the point of view of reaching an agreement. Whether the problems of conflict of interest were before him at that time and what he thought about them is another question. The only thing I know about what he thought about the conflict is that he is reported as having expressed some concern at one point about this situation.

Q. So Judge Higginbotham --

A. Whether that was the first kind of conflict, whether anyone pointed out to him the problems, the other kinds of problems that I have discussed, I ... don't really know. It seems to me that the avoidance of conflict is in the first instance something that lawyers are supposed to do, and you can't go around saying: Well, the judge never told me to do any differently, so it must be okay.

Q. Well, Judge Higginbotham had been advised of the fact that there were potential conflicts. Correct?

A. He had been advised as to the first class of conflict that I mentioned between the futures and the present class.

Q. Notwithstanding, he nevertheless recommended that a futures deal only be pursued. Correct?

A. I gather he did, yes.

Q. Does that in any way alter your opinion that what these counsel did here was ethical?

A. No, not unless I find that situations were presented to him and he was asked to reach a decision about them.

Q. You have no information as to whether the Ness Motley deal was any better or worse than the global deal that's before the court here, do you?

A. I have some information, but I don't purport to be qualified to form an opinion on it.

Q. Okay. And you're also aware of the fact that ... the risk of the coverage cases that were pending in California was a very important consideration for setting counsel, was it not?

A. Yes.

Q. I see. And was it also important that that counsel try to resolve a global settlement prior to the final resolution of the coverage cases in California?

A. There was some concern that there be a commitment by the insurance companies to pay in substantial sums of money rather than wait and see what the results of the coverage cases would be.

Q. Right. As part of a global settlement?

A. As part of a global settlement or otherwise.

Q. Right. And you're aware of Justice Kaufman's opinion that there was a significant risk that Fibreboard might lose the coverage cases?

A. I haven't read his opinions, but I've read that that was his opinion.

Q. Do you think adding more counsel to the plaintiffs' negotiating team would have facilitated a quicker resolution of the global settlement in light of the tendency of the coverage cases in California?

A. I don't know.

Q. Do you have any reason to believe that it would have hastened the resolution of the settlement?

A. I have no reason to believe one way or the other. I can see, you know, it might have helped, it might have hurt.

Q. How could it have helped?

A. Well, sometimes if you add another person, that person comes up with a helpful idea. Sometimes if you add another person that just means another person goes along with everyone else.

Q. So if you have one representing pre-'59s and one representing post-'59s and they're arguing with each other, do you think that's going to make the settlement negotiations go quicker?

A. Not in themselves, no.

Q. And you think that somebody representing presently injured people and somebody representing people who aren't injured, they're talking about how that should be divided up, that's going to make the settlement negotiations go quicker?

A. Not necessarily, no.

Q. And do you think the people representing more seriously injured people and those representing less seriously injured people, if they're fighting about who should get what portion of the pie, that's going to make the settlement talks move along more quickly?.....

A. Not in and of itself, no.

Q. Weren't they under pressure to get these settlements done before the California court ruled on the coverage case?

A. Yes, they were.

Q. You suggested before if somebody settled their present cases on all-cash basis that counsel could go forward and negotiate a futures deal?

A. I believe so, yes.

Q. Are you aware of any plaintiffs' asbestos lawyer that settled with Fibreboard on all-cash basis at any time after 1991?

A. I haven't heard of that, no.

Q. So who would Fibreboard and the insurers have been negotiating with to consummate a global deal?

A. Well, it was Fibreboard that wanted to have a global deal, and so I think it's quite possible that if Fibreboard had realized this was a problem that they would have arranged a settlement with some of those lawyers.

Q. So they could have paid cash to one lawyer to settle a case and pay all the other settlements and assignments and use their one counsel that they paid cash for to negotiate a global deal? Is that what you're suggesting?

MR. BAUGHMAN: Objection, Your Honor. This has been fully explored by Mr. Bschorr, I believe.

MR. KAPLAN: I don't believe it has, Your Honor.

THE COURT: Overruled.

A. I think they could have done that, yes.

MR. KAPLAN:

Q. How would the select that particular counsel they're gong to favor by giving cash to when they're not giving cash to anyone else?

A. I suppose the same way they selected the counsel they did decide to negotiate with. They suggested Mr. Kazan, Mr. Wartnick and the two lawyers from Ness Motley on some consideration, some of which have been mentioned today; and they could have used the same grounds for selecting them.

Q. You don't think that paying cash to one lawyer in order to be able to negotiate a futures deal would have created some appearance of impropriety?

A. Well, some people might have objected to it; but the point is that once the money has been paid, remember, the lawyer is not simply getting cash, the clients are not simply getting cash, the lawyer is giving up the prospect of representing other present clients for a period of some years into the future. And once the money has actually been paid, there's no continuing existence of any conflict. Some people might think this was a bad thing to do. Some people would think that having a settlement class action is also a bad thing to do. Whatever you do in dealing with asbestos litigation, someone will think that it's being done wrong. That's not the question I've been brought in to testify about. It's what was professionally proper.

Q. Let's talk for a moment about the subject you just mentioned, which was giving up your cases while you're negotiating this futures deal. As I understand it, in your view, the person negotiating this futures deal would have had to settle their present cases. Correct?

A. Right.

Q. And not take on any new cases. Correct?

A. Right.

Q. And for what period of time would that person have to do that in order to be ethically able to negotiate this futures deal?

A. For as long as they wanted to participate.

Q. I see. So in this case I think there's some testimony that some negotiations began in 1991.

A. Right.

Q. And they weren't consummated until 1993. Correct?

A. Yeah.

Q. So for two years somebody would have to give up their asbestos cases in order to negotiate this futures deal? Is that what you're suggesting?

A. That was one of the possibilities. And the other, of course, was selecting someone with other kinds of expertise other than asbestos trial expertise.

Q. But if all things considered somebody that had asbestos expertise would be the person that would be most proper to negotiate on behalf of asbestos victims, wouldn't it be implausible for that person to give up his or her practice for two years in order to negotiate a futures deal?

A. Well, I don't know. I never tried it. I know there's substantial fee possible as a result of this deal for at least some lawyers, and that there's a possibility of work in the future, and that some lawyers don't do only asbestos cases, they do a mix of cases, including some asbestos and some other cases. So, of course, a lawyer wouldn't have to give up the other cases. And for that matter, if he wanted to be technical, just the asbestos cases against Fibreboard, though I realize that doesn't make an enormous practical difference.

Q. Some guy who walks in their office with a claim against Fibreboard and other manufacturers, they would have to get another lawyer to represent them against the other manufacturers. Correct?

A. Yes.

Q. So they would have two sets of lawyers working on the same cases. Right?

A. No, they wouldn't. That wouldn't be a sensible way to handle it. Someone who had a claim against both Fibreboard and

other manufacturers, the sensible think would be for the lawyer we're dealing with not to accept that case. I was raising the possibility that someone might have a claim that was not against Fibreboard at all, but just against other companies. I realize that most asbestos claims are likely to be against a number of companies.

Q. So in that situation class counsel would have to refrain from representing the plaintiff against Fibreboard, and that plaintiff would have to get other counsel to represent him against Fibreboard. Correct?

A. And the other defendants, yes. He wouldn't hire this counsel, he would hire someone else, who would then represent him against all of the defendants he was suing. Fibreboard and the rest.

Q. I see. So these class counsel then couldn't represent any asbestos plaintiffs then, is that right, since Fibreboard is implicated in most of the cases?

A. In any case in which Fibreboard is a defendant.

Q. Which is most of the cases. Right?

A. Right.

Q. Now let's talk about subclasses for a second. You were trying to draw some line between people that were presently injured and people that might be injured in the future. I believe you testified in our deposition that you couldn't pick a specific time as to when that distinction ought to be made. Is that right? In fact, I think you used the word "arbitrary."

A. Yeah.

Q. What date would you choose to decide the cutoff point between the different representations?

A. I wouldn't feel that that's necessary. As I said before, I'm not proposing at this point a subclass in the sense of a formal delineation by the court of two disjunct groups of people. I'm proposing lawyers to represent two interests, present cognizable injury and those who will not be injured until somewhere in the future. Where you choose to draw the line between those is a de-

cision that simply doesn't have to be made. There are these groups of people which are easy to identify in the extreme, although like most groups they shade into each other. It's often difficult to tell whether one individual is or is not in a class. But that doesn't prevent you from having class action. In this case, you don't have classes, you just have lawyers who are representing interests.

Q. The reason you think there should be that distinction between people that are presently injured and those that aren't yet injured is because the people that aren't injured might not get paid? Is that right?

A. Yeah.

Q. So you would have to determine when in time in the future that eventuality might happen. Right?

A. No. You would do what I just said. You're just repeating your previous point. And the answer I gave to it before applies to this version, too. They're not drawing a line. Don't have to draw a line. Just have to appoint two lawyers and tell one of the lawyers, "You should speak up for those people who have presently existing claims and want to get things like prejudgment interest"; tell someone else, "You should speak up for those people, whoever they might ultimately turn out to be, who won't be having claims that accrue for some time yet and who therefore would prefer to sacrifice the prejudgment interest in order to get paid anything at all."

Q. So this particular lawyer wouldn't know who his clients were, is that correct?

A. He would know his clients were the members of the class, he would know some of the people whose interests he were protecting; in other cases, he wouldn't.

Q. I see. Now, one of the things that you pointed out in your written opinion that you didn't mention today was that you would make some distinction between people that are more sick and those that are less sick, and you would have separate lawyers representing those separate folks?

A. Right.

Q. And you would bring in how many different lawyers to represent those different groups of people?

A. That was something I said in my opinion. I didn't say it today. But when I did say it, I was thinking that you would need to bring in two more lawyers for that purpose as well.

Q. Since you didn't mention it today, have you withdrawn that as a basis of objection?

A. I've decided that although there are definitely problems raised here, it's not as clear a case to me as the others; and therefore, I spoke to counsel, and they decided they were not going to ask me to present my views on that particular issue.

Q. Okay. Let me ask you a couple of more questions, and I'll be done with you.

Assuming that class counsel used their representation of their present claimants to somehow leverage up the amount of money that they were going to be able to get for the futures class, would that change your opinion as to the propriety of their conduct?

A. Well, if I were convinced that that had occurred, that would certainly be a relevant fact. I would want to know more details.

Q. How relevant would it be?

A. Well, the danger, I'm concerned about two sets of dangers. I take it you're addressing yourself to the futures present conflict, the first one I discussed.

Q. Yes, I am.

A. And the danger there is, of course, that their duties to present clients will lead these lawyers not to represent their -- their future class as vigorously as they might otherwise. What you're saying is: Imaging that for some reason their representation of the present class is used by them to improve their representation of the futures class.

Q. Yes.

A. Well, if it could be shown that that had happened, that would certainly indicate that the problem had not materialized. The problem is, as I said before, you have to compare things to the hypothetical situation in which the futures are represented by conflict-free lawyers. And that's very hard to do.

Q. At the onset of negotiations, how would class counsel be able to identify all the various interests which would require separate counsel?

A. Well, that's -- they would have to item them as they became identifiable. Since these were lawyers with great experience in asbestos litigation, as you

Testimony of John Leubsdorf, legal ethics expert Tr. 1939-1941

problem wouldn't arise looking forward would be to use your previous testimony for Fibreboard to have paid cash for something. Right?

A. Or alternatively to use the lawyers without asbestos litigating --

Q. I'd like to address that. You understand that on the basis of this record the court may find that Fibreboard paid no cash during the period of 1991 -- all cash to settle their cases. Correct?

A. Yeah.

Q. Therefore, if the court were to find that, then the lawyers that Fibreboard agreed to pay cash to would be getting special, beneficial treatment, right, better than everybody else in the country?

A. Right.

Q. And --

A. I don't think the equal protection clause applies to Fibreboard, as far as I know.

Q. Well --

A. They're allowed to settle with some people and not with others.

Q. Do you think settlement negotiations have to be described in a class notice?

A. Yes.

Q. Do you think they would have to describe in a class notice that Fibrebroad had selected some lawyer and agreed to pay out all his cases for cash so that he could agree to be a futures negotiator would have to be described in the notice?

A. The part about selecting the lawyers is described in the notice anyway, and if there are conflicts they should be described. And if those conflicts have been removed, they should also be described.

Q. That means the answer to my question is yes?

A. Yes, the answer is yes if you should describe all the relevant facts in the notice.

Q. What do you think the reaction of the plaintiffs' bar would be to the appearance where the futures class counsel was the only plaintiffs' counsel in the country that had gotten all cash for its cases as a quid pro quo for agreeing to negotiate a futures deal?

A. Well, first of all, no doubt some members of the plaintiffs' bar would be upset, other members would notice that while they had gotten cash and while their clients had gotten cash, these lawyers had had to agree in response to stay out of the asbestos litigation area for a number of years, which might be a substantial hardship on them and might countervail the previous --

Q. Now --

A. And -- and ultimately, you know, the question is not what -- what the plaintiffs' bar will like, the question is what is fair to the claimants and what is consistent with the requirement of Rule 23. It may be that the plaintiffs' bar would be very discontented. They would probably be discontented with any class action settlement at some point, because it prevents them from bringing separate suits unless it's carefully written to preserve those rights.

And that's always open to question. But the question isn't what the plaintiffs' bar likes.

Q. Do you know how many objections have been filed by plaintiffs' lawyers in this case, Professor Leubsdorf?

A. Few, I understand. At least people actually proceeding with objections.

Q. Isn't it true that something a court is asked to take into account in approving a settlement under Rule 23 is the extent of objections?

MR. BAUGHMAN: Objection.

A. Objections from the class members, not objections from lawyers who feel that they haven't gotten --

Testimony of John Leubsdorf, legal ethics expert Tr. 1944-1945

I am in all this. I understand your point. It's already, I think, been made, the court's quite prepared to judge the credibility of the testimony of this witness. I would suggest that we are getting a bit cumulative. And some of the points you're making can be addressed at argument time, because they are argumentative.

[LAUGHTER]

THE COURT: And if we have something new with this witness, lets's -- let's get to that; otherwise, let's move to Professor Sherman.

MR. LOCKWOOD:

Q. Professor Leubsdorf, if this plaintiffs counsel that took all cash had agreed with Fibreboard as part of that settlement that they wouldn't take on any more present cases so they could negotiate a futures deal --

A. Right.

Q. -- wouldn't that violate the canon on agreements to restrict practice?

A. Well, I don't know that they would have to agree to do it. They could simply represent that they had no plans to do so. If they changed their mind, they would have to withdraw from the negotiation.

Q. So Fibreboard could kind of have a series of plaintiffs' counsel they pay cash, they withdraw from the deal, they pay cash to another guy, withdraw from the deal --

A. No, I don't think that would follow. I think lawyers would usually stick to that representation if they were the kind of people you wanted to negotiate with in the first place. Also, it's not clear to me that the agreement you're describing would be a violation of that provision. That purpose is to provide -- the purpose of that provision is to prevent defendants from, as it were, buying plaintiffs' lawyers out of the representation area simply in order to avoid being sued by them. In this case, the purpose of the agreement is to secure conflict-free representation, itself a goal, important goal, under the model rules and under all systems of legal ethics. And to agree that you would avoid a conflict of interest is I think rather different from saying, "Okay, I'll settle this case for you and I'll give you the further bonus of saying that I never again will sue Fibreboard in an asbestos case." The second is clearly wrong. The first serves some legitimate purpose, and I know of no particular authority on the issue, but I think it

Testimony of John Leubsdorf, legal ethics expert Tr. 1948

A. But whether that means he reached any conclusion one way or the other about Rule 1.7, or Judge Higginbotham had either, I think judges reach decisions when matters are placed before them. I don't think one should go around assuming judges will take the responsibility for ethical issues sub silentio.

Q. You testified -- assuming for the sake of discussion -- well, let me back up. You have no personal knowledge of where one would find a lawyer experienced in asbestos cases that would

be willing to go out of the business for two or three years to negotiate a futures class. Isn't that true?

A. I have no particular names in mind, if that's what you mean, no.

Q. You have no expertise, you have no experience, you don't know anything about the plaintiffs' asbestos bar, do you?

A. I think I know something. But I certainly don't claim to be an expert on who are the best asbestos lawyers in the plaintiffs' bar. It's something that one could find out, but I certainly don't' claim to have found it out.

Q. I'm not asking who are the best. I'm asking: Who are the ones that are willing to go out of

Testimony of John Leubsdorf, legal ethics expert Tr. 1953-1959

their experience in that case. I think there are dozens of firms in the country that would be very glad to undertake such a project. We're talking, remember, about a three percent fee on a total of more that one-and-a-half billion dollars. That is not a small reward that we're talking about.

Q. How many cases, Professor, can you -- I mean, all sorts of things are possible in this world. Could you tell the court of your knowledge how many Wall Street firms you're aware of have handled --

THE COURT: Counsel, this point has been milked until the udder is dry.

[Laughter]

MR. LOCKWOOD:

Q. On the pre-post-'59 issue, one question. If the court in reviewing -- let me back up.

Are you -- you're aware, are you not, that the provisions on how the funds of the trust will be paid out were not negotiated until after the trilateral was signed on October the 12th?

A. That's my understanding.

Q. So if the court were to determine that the trilateral agreement provided that the insurers' funds there could be used to pay equally pre-'59s and post-'59s, is it still your opinion that you needed two sets of lawyers, one representing pre-'59s and one representing post-'59s, during the period October 12th, 1993, to the date the global agreement was executed?

A. Yes. "Could" is just a possibility. You still have to decide whether that's actually going to happen. And that is part of the negotiation of the Ahearn settlement, not part of the trilateral.

Q. So -- so the pre-'59 lawyer then would say, "Well, even though the trilateral says that the insurance funds are going to get paid equally to everybody if there's not a global, since there's a possibility that the trilateral might not be approved, we have to have the global structured so that the pre-'59s get more than the post-'59s," is that your testimony?

A. No, you wouldn't have to say that. That's not my testimony. I never said that. He would have to say something like, "Well, historically, people in the group that I'm speaking for have gotten more, and they've gotten more because it was unclear that there was ever going to be any coverage, and that is part of the wonderful facts that have to be considered. We're considering not just the nature of the disease, but the forum, the law of the state in question, and part of the law of the state has traditionally been until two weeks ago that people who had post-1959 injuries were simply not going to be able to get as much money as others. That is an advantage which we're entitled to keep." Now, I'm not saying that I agree with that argument necessarily. There are arguments on both sides as to what would be the fair course of action. And you have to negotiate it out the way you negotiate out any other --

Q. Let me make sure I understand your last answer. Are you saying that it is your understanding that the pre-'59/post-'59 matter is a jurisdiction, is a matter of law in some jurisdictions?

A. Whether you have access to insurance coverage might be affected by state law.

Q. Well, the value of the pre- and post-'59 cases that you've been talking about that are referred to in this case are settlement values, are they not?

A. Yes.

Q. Not litigation values?

A. No. That's true.

Q. If a post-'59 case went to trial and a pre-'59 case went to trial, the verdicts were not going to be affected by the availability of insurance, were they?

A. No, that's true. But in order to collect the verdict, you have to have -- you know, you have to have a defendant against whom you can levy execution. And the law of the states, most states, as I understand it, was that in general the post-'59 claimants were only entitled to levy execution against the funds of Fibreboard, which were very limited. Of course, the post-'59 couldn't go directly against the insurance company, but there was a claim that they could ultimately have gotten that against CNA and Pacific, which would ultimately have led to their receiving more money for the same -- same dollar verdict than the post-'59 claimants would have gotten.

Q. And that was because of the insurance contracts which covered pre-'59 claims but not post-'59 claims. Right?

A. Right.

Q. Now, doesn't the October 12th trilateral legally modify and replace those insurance contracts if the court finds that that agreement says that the funds made available by the insurers can be paid equally to pre- and post-'59 claimants?

A. Yes.

Q. What do you mean --

A. And then you have to decide what you're going to do about it. Are you going to say, "Okay, things have changed now, but the old way was the way in which things would have occurred if there not been the settlement, and that's the way it should be

preserved? Or are you going to say, "No, now we have a new situation, and now we're going to treat everyone equally"? Those are two different situations.

Q. What's the argument in favor of ignoring the trilateral? Could you enunciate that for the court's benefit, please?

A. I've been trying to do that. The argument is that this is a part of a general settlement, it's designed to get people what they would have gotten more or less in the tort system, and that what people would have gotten in the tort system before this settlement included both the trilateral negotiated was greater in the pre-'59 payments than in the post-'59 payments, and we, the pre-'59 claimants, shouldn't be required to give up that prospect of full compensation for us as part of the settlement. If that's so, then we are getting off -- we're being treated worse than we would have been had there, for instance, been some -- some other result. And therefore the settlement should continue to ride in, perhaps not totally, but to some extent, maybe just a priority for the pre-'59 claimants, if there's enough money. There should be something to protect the advantage that we have traditionally and historically gotten.

Q. Okay. So your solution for making sure that that agreement is presented in the course of the negotiations would be to identify some lawyer and say "You have the sole responsibility of presenting that position on behalf of the pre-'59 claimants here"?

A. Correct.

Q. Is that correct?

A. Yeah.

Q. And then that person gets to negotiate with somebody representing the post-'59 claimants whose position is, "Under the trilateral, we get equal access to the insurance assets, we will never agree to your position." And how does that negotiation then get resolved?

A. Well, it gets resolved like most negotiations. The parties present their arguments, they make their threats, all of them want to reach an agreement for the benefit of their clients, eventually

some result is worked out, as I take it it was worked out in the Johns-Manville case --

Q. Supposing they reach an impasse. What would happen? They've got a billion-and-a-half dollar deal and they're at impasse on whether the pre-'59s should get better treatment than the post-'59s. Do they go to the court?

A. Well, there are various things they might do. They might resort to alternative dispute resolution, they might arbitrate, there are all sorts of ways in which you can resolve a negotiation. That happens all the time. Actually, it's always possible in any negotiations, but it won't work. That was possible with this negotiation, too.

Q. So if they went to the court --

THE COURT; Just a minute.

MR. BAUGHMAN: Your Honor, I think this is cumulative and this one question has expanded significantly since Mr. Lockwood's representation.

THE COURT: Mr. Lockwood, I appreciate the fact you're enjoying yourself --

[Laughter]

THE COURT: Have I not heard quite enough from this witness?

MR. LOCKWOOD: Let me check with my --

Testimony of John Leubsdorf, legal ethics expert Tr. 1973-1974

understanding that as far as you know, Mr. Kazan, Mr. Wartnick, Mr. Cox and Mr. Rice all have significant asbestos litigation experience, and Mr. Kazan and Mr. Wartnick particularly have what's apparently a specialized knowledge of Fibreboard Corporation. Do you believe it would have been approximate at the time that they were first asked to negotiate on behalf of future

claimants for them to act as consultants to other counsel who might negotiate on behalf of those claimants?

A. Yes.

Q. On August 11th, when this court -- 1993, when this court appointed as negotiating counsel those people who eventually became class counsel, in your opinion, would it have been appropriate instead for them to have appointed the Caplin & Drysdale lawyers as negotiating counsel?

A. That would have been one way of handling the situation.

Q. Would that have been better, in your opinion, than appointing those lawyers that did represent present claimants?

A. Well, it would have had the advantage that Caplin & Drysdale did not represent present claimants and at the same time they were extremely familiar with the negotiations. So I think it would have been, on the whole, superior as far as the conflict point is concerned.

Q. You had a little colloquy with the court regarding whether or not there was any taint with respect to the trilateral agreement caused by the conflicts of class counsel. Is it not your understanding that class counsel's involvement in the trilateral was limited to their demand that there would be in fact be a trilateral?

A. I haven't seen any reference to their participating in the negotiation sessions that led to the trilateral, but I haven't seen a lot about those negotiation sessions at all.

Q. Assuming that they did not participate in the negotiations beyond making the demand that they would not enter into a global settlement unless a trilateral was to be agreed upon by Fibreboard and continental, does that lead you back to your conclusion that there was no taint on the trilateral agreement?

A. It further supports my conclusion, yes.

Q. Prior to being contacted by me in connection with the Ahearn case, had any other party in this case contacted you with respect to the Ahearn matter?

Testimony of Dr. Mark Peterson, expert on future claims projection Tr. 2002

could conceive a basis where I would not object and a basis where I would object.

THE COURT: Let me give you the opportunity to object after you've heard it. And the court will rule on it.

MR. INSELBUCH: Very well, Your Honor. Thank you.

MR. LIEBHAFSKY:

Q. Sir, do you have an opinion on the sufficiency of the global?

A. Yes, I do.

Q. What is your opinion?

A. I think it's highly likely that the amount of money available on the global agreement would be sufficient and indeed under any -- any plausible scenario of a great number that I've examined, I believe there will be sufficient amount of money.

Q. Certainly, sir, do you have an opinion one way or the other as to whether the global at the end of the day or the trilateral agreement will put more money into the pockets of asbestos victims?

MR. BARON: Same objection, Your Honor.

MR. INSELBUCH: I do not share that objection.

[Laughter]

MR. WACHTELL: Neither do I.

THE COURT: I give you both the right to lodge objections at the end. The court will accept them and either accept the testimony of this witness or not.

MR. BARON: I just want my objection on the record.

A. I believe I do have an opinion.

MR. LIEBHAFSKY:

Q. What is your opinion?

A. I believe again -- in fact, it's a fact, I don't believe, it's clear that under any circumstance more money would be provided

to the claimants under the global settlement than under the trilateral agreement.

Q. Now turning to how you got to your bottom lines, I'd like to take up first with you the topic of how you went about estimating the numbers and types of future claims that would be asserted, putting to one side for later discussion how you would price those claims. And let me just ask you first if you would explain to the court in a very general way how you went about your task in this respect.

Testimony of Dr. Mark Peterson, expert on future claims projection Tr. 2035-2036

value 50 percent cash and 70 percent for the non -- for the credit part of it.

Q. Now, was there another pricing issue presented by the historical differentiation made between pre and post-'59 claims?

A. That was actually a more complicated issue, I think. Historically and apparently it's been described in this court, there were -- the availability of insurance for these claims differed in the amount of money that was paid in settlement of the claims, liquidated value settlements differed where the first exposure was before or after 1959. And so on the other hand, a lot of that differential was the result of the availability of insurance coverage for the pre-'59 cases but not for the post-'59 cases. So it was necessary to try and figure out what the post-'59 cases might get in the future once that differential was eliminated by the trilateral agreement.

Q. And did you do a regression analysis to look at that issue?

A. Yes, I did. Two things. First of all, I found that if you looked historically at the values of claims when they were filed, there was a steady decline. Excuse me. When first exposure was. Cases with first exposures in the earlier years holding constant what the disease was, analysis across all diseases, as you look at

it, over time cases with more recent exposures tend to get somewhat less value even before 1959. Then you got to 1959 historically, and they just dropped way off. Wasn't much different there. Low into the future. That suggested to me, and there were a number of independent reasons to believe that cases that had post-'59 exposures like Fibreboard probably had less value even once you removed this effect of the insurance coverage. And so what I did, I did a multiple regression analysis that's a statistical analysis that looked at how important elements of the pre-'59 claims were related to the size of those settlements, and I took the results of that analysis and applied it to the post-'59 cases.

Q. And is the bottom line that you haircut the post -'59 values 30 percent versus the pre-'59 values?

A. Yes. Both because the statistical analysis suggested that's the appropriate amount and also became of a number of factors that I think are different with post-'59 and pre-'59 cases.

Q. Now, was there another valuation issue presented by the so-called surge claims?

Testimony of Dr. Mark Peterson, expert on future claims projection Tr. 2054-2055

I may be inclined to think the numbers would go up more under the trilateral, more likely to go up than they would under a comparable scenario under the global event, global settlement.

Q. There's a table in your report, the big exhibit, exhibit 34, that I would like you to turn to. I think it's table 39 on page 65.

A. Yes, I see it.

Q. Can you tell us what that table represents?

A. That's a table that includes the -- my best projection of what would be the values of these -- of the projected future claims, both the indemnity values and the cost to defend them. Obviously those numbers exceeded the amount of the trilateral agreement. But it's under the assumption that all these claims

were processed, that's what the total would run to, and that's assuming that the cost of defense would be a hundred percent of the indemnity cost. The defense cost would be equivalent to the indemnity cost.

Q. Now, we have in the documents here, if you'll look at exhibits 37 and 37A, I think we have presented an optimistic case for the trilateral and a pessimistic case. Would you look at those two exhibits and discuss them with us, please?

A. Exhibit 37, or table 48, compares -- starts with the total amount available under the global settlement and under what is probably the most optimistic value of the trilateral agreement net of the payments for present claims and including the value of Fibreboard Corporation, so that that would generate at most about $1.87 billion. And then it just reflects, as you go down, what percentage of the total corpus in each case would be expended on the cost of defending this litigation. The remainder is obviously available to pay claimants, of which a part goes to -- it gets deducted for the plaintiffs' lawyers and it ends up with a net of how much plaintiffs might be expected to receive under each of those two, and under table 40B under an alternative, less optimistic valuation of the trilateral.

Q. Are all the cities there that say "TR" to the transcript of the hearing in this matter?

A. Yes, they are.

Q. Look back at the graphics for a moment. That's exhibit 48. And please turn to E.

A. E in 48, yes, I have it.

Q. Is that in substance a graphical representation of the results of comparing your optimistic and pessimistic trilaterals versus the global as to how

Testimony of Geoffrey Hazard, expert on legal ethics Tr. 2313-2320

Q. Now, is that complete or is there anything missing on that?

A. I've since looked at the Fibreboard Pacific agreement, and there may have been one or two other documents, but I think this is complete, aside from the --

Q. Have you also had occasion to review Professor Leubsdorf's testimony that took place yesterday, the transcript of that testimony?

A. Yes, sir, I did.

Q. Now, in giving your opinions, do you rely on any particular body of authority or authorities?

A. Well, I know the Texas Rules of Professional Conduct, which are quite similar to the ABA rules, with certain modifications, but the modifications are, in my opinion, not significant in this case.

I'm familiar with the California law, which again is different fro the model rules, different from Texas, it has a unique history of its own. On the matters involved here, I don't think it's relevant -- there are any relevant differences.

I'm familiar with the rules that apply in most states because most of them are based on the model rules. And the same point holds, I don't think there are any differences of significance so far as the rules are concerned.

Q. In addition to the rules, are there any other body of authority that you rely on with respect to your opinion?

A. Well, I take account, first of all, of the common law on this subject, decision law interpreting those norms, practice norms, that is, how lawyers commonly interpret what those rules are. I should say responsible lawyers interpret them. And literature on the field. I've read extensively. I think I'm fully conversant with broadly the literature on conflict of interest.

Q. Let me turn specifically to the model rules. Model Rule 1.27, are you familiar with that, sir?

A. Yes, sir.

Q. Now, that has two subparts to it, does it not, A&B?

A. Yes.

Q. As the basis of your opinion, do you view one or the other of those as more significant to the issues we will be discussing here today?

A. I think 1.7(b) is the one that governs the responsibility of the lawyers in question here.

Q. You also are aware of model Rule 1.8(g)?

A. I am.

Q. And how does that, if at all, relate to the opinions you'll be giving here today?

A. That rule implicitly recognizes the propriety of the lawyer representing more than one client or indeed multiple clients who are claimants in a proceeding, it requires that -- apart from the responsibilities in 1.7, it requires that the clients so represented to be informed about a settlement and the terms of the settlement when a single settlement resolves the claims of all those claimants. That is a -- it's an additional requirement about disclosure and consent beyond what might be required by 1.7(b).

Q. All right. Now, as a result of the work that you've done in this area and the documents you've reviewed, have you formed an opinion concerning the conduct of class counsel throughout the period of time in question?

A. Yes, I have.

Q. What I'd like you to do, sir, is break that opinion down somewhat chronologically through different periods of time. First I'd like you to focus on the period of time when sometime around the beginning of 1991, when I believe the record indicates that some discussions on what was called a global settlement began between representatives of Fiberboard and some of these class counsel or people who become subsequently known as class counsel, and at the end of that process, April 1993, which is the

point in time when CNA as one of Fibreboard' insurance carriers came onto the scene and signed an agreement with Fibreboard to proceed. During that period of time, have you formed an opinion as to whether anything that any of the class counsel did or people that subsequently became known as class counsel did during that period violated any ethics rules?

A. I have an opinion.

Q. And what is that opinion?

A. I don't think there was any violation at all.

Q. Could you state your reason for that?

A. At that point, the discussions, as I read them, were exploratory, qualified, intermittent, episodic, uncertain in their foundations, they were looking at the possibility, perhaps, of a global settlement, not well defined, but an idea of such a settlement. There was, therefore, no identified class at that time; there was no set of people that definitely were in a class. I don't think there was in any proper sense of the word a client that these people, the lawyers, were representing. I think they were considering the interests of those people, but I do not think that they had anything approaching a representational relationship to them. That's No. 1. So there wasn't a client, in my opinion; therefore, there couldn't have been a relationship giving rise to conflict of interest.

Second, as I reviewed the record, I don't see that they did anything that was in any way adverse or constrained so far as the interests of those people were concerned. Nothing that they did was adverse to their interests, nor could I see that it was impaired by their, at that point, continuing responsibilities to members of the present -- what are now called the presents, which were simply various people that were represented by the law firms of Ness Motley and eventually Casein and Wartnick.

Q. Now, you referred before to 1.7(b) being the operative provision of the code that would deal with this area; is that correct?

A. Yes.

Q. Now, that provision talks about situations where there may be a material limitation on the representation because of responsibility to another client? Do you recall that?

A. Yes. Or on account of the lawyer's own interest, yes.

Q. In either case, you do not see any violation of that rule during that period of time; is that correct?

A. No, I don't think they had a client, and I don't think that there was anything about that set of people for whom they were expressing concern or thinking about the possibility of doing something, there was anything that constrained what they might do on their behalf. So had they been regarded as a client, I think there was, in any event, no conflict of interest.

Q. Let me move forward to the next chronological period of time from April 1993, when CNA insurance company entered into its agreement with Fibreboard and came onto the negotiating scene, and August, or just before the time on August 9th, 1993, when this court appointed the four individuals, Messrs. Cox, Rice, Casein and Wartnick, as class counsel. During that period of time, do you see that anything or any activity by any of those four gentlemen in any way violated any ethics rules?

A. In my opinion, it did not. In my opinion, it was in conformity with ethical requirements.

Q. Is there anything -- during that period of time, is there anything different going on that would in any way impact on any of these issues?

A. In that period, Judge Higginbotham, acting as an appointee of the court to facilitate the possibility of settlement, was on the scene. That focused the discussions in a way that they had not been before. The documentation and the testimony indicates that a more -- how shall we say? -- sharper definition of a possible class was emerging, there was a discussion of having a class to include both the presents and the futures or, as an alternative, perhaps only the futures. Given that kind of focus, even though there was not yet a client, because there wasn't a class, I think that the lawyers assumed a responsibility for the interests of those folks

that I would characterize as a fiduciary responsibility, one might call it an incipient representation, if you wanted to. I think that they felt -- the indications are they considered themselves speaking for those people in a qualified and conditional way, to be sure; but speaking for their interests and considering them as such, it seems to me that they were not constrained in the assertions, position-taking that they could do for those folks. So I conclude first that there were not, strictly speaking, clients; secondly, that the futures were at that point people protected by something in the way of a fiduciary duty; and third, that the duty that was owed could be defined in the same terms of -- of loyalty and -- and unconflictedness of purpose that a lawyer would owe to a client. And judged by that standard, fourthly, in my opinion, they observed those standards.

Q. Do you see that there was any conflict or any difference of interests between the fiduciary obligations you just described that these four individuals had to this incipient group of people, the futures, however it was to be defined, and their present or any of their present clients who they may have been representing in the tort system with respect to asbestos claims against Fibreboard?

A. No. I think that if you put the case most strongly concerning the relationship it would be to look at those folks as already becoming clients, though I don't think they had, but it's -- assume that they were. Then you have a situation of a lawyer representing some people who have claims that have not yet been asserted, and he is representing them vis-a-vis the same set of potential obligors; namely,

Testimony of Geoffrey Hazard, expert on legal ethics Tr. 2321-2331

Continental, Pacific and Fibreboard. And as I understand the law and settled practice, a plaintiffs' lawyer may represent more than one person against a defendant or a set of defendants without there being any conflict of interest arising from that fact. That seems to me to be essentially what the situation was. There's no indication that they did anything incompatible with the interests of the futures or for that matter the interests of the presents, and therefore it seems to me that judged by the most exacting standard you could apply in that interval that their conduct conformed to the standards of professional ethics.

Q. Now, in forming that opinion, did you take into account the coverage litigation that was going on in California between the insurance carriers and Fibreboard? And if so, did that in any way impact on your opinion?

A. In this, yes, I did take account of it. The fact of the coverage litigation was a -- a severe risk to the presents and to the present -- and to the futures alike, because if the California litigation had an end result adverse to the coverage, then the amount available to pay anybody was limited to the assets of Fibreboard. Maybe there had been -- there would have been a partial victory in the -- in the California litigation, but it could have resulted -- there was a very severe risk in total loss or a radical reduction in insurance coverage being upheld by the California courts. Fibreboard had an asset value that is in the order of magnitude of 215-250 million. Obviously, there are other property interests and claims against that; but even assuming that those resources were fully available, they were dwarfed by the claims of the presents and by the claims of the futures and dwarfed by the combination of them. So that the loss of the insurance coverage in California, loss of the insurance case would have been nothing less than catastrophic from the point of view of the plaintiff claimants. It also would have been, of course, catastrophic to Fibreboard. So that is

a realization that was always present. However, the California appellate court had signaled, as I understand it, that it was moving into fear for final deliberations, and therefore that menace was now coming on the immediate horizon instead of being a more distant prospect. And I think that that was a consideration that a lawyer for the present was required to take into account, and I think it was a consideration that someone endeavoring to act for the futures, as I interpret these lawyers then to have been doing, was similarly required to take into account, and it was a very strong impetus or incentive to see whether a suitable arrangement might be worked out by negotiations.

Q. I take it, sir, that the risk that you've been describing basically is a risk that all of these claimants who might have had claims against Fibreboard would have had that their claims might have been substantially impaired as they go forward, assuming the coverage case came out a certain way.

A. If the coverage case went against Fibreboard, it would cut off the insurance for -- liability insurance coverage available for the presents, for the futures, for all time, for everybody.

Q. Were you ware, sir, that there was also litigation going on between CNA and Fibreboard with respect to the validity of certain assignments of insurance policy benefits that had been made previously as part of settlement entered into with the claimants?

A. Yes, the claim essentially by Continental was that the Fibreboard arrangement, stratagem, call it what you will, constituted a breach of its duty of cooperation which would have the effect of nullifying any coverage that might be upheld in what we call the coverage litigation then pending in the California appellate courts.

Q. And again with that litigation in mind, were all of these claimants again facing a further risk of substantial impairment?

A. Obviously if Continental were able to make that claim stick, it obviously was a disputable claim. But then Continental would be out of the picture and Fibreboard would be reduced to looking to Pacific, the coverage of which was substantially less.

Q. Towards the end of the time period we're talking about, April 1993 to August 9, 1993, just before the appointment of class counsel, another event took place, the renegotiation of the Ness Motley agreement, whereby CNA, Fibreboard and the Ness Motley claimants entered into what became known as Ness Motley 2. Does that in any way figure into your opinions?

A. I'm aware of it. It had the effect, with some qualifications, of setting the so-called presents case. It had, however, provision that some of the benefits to be paid were conditioned upon there being in place a trilateral and then the global, which were so-called triggers, as I understand the arrangement, for those payments. Now, I am quite aware of that relationship. One could say that the resolution of those claims transformed -- in Ness Motley 2 transformed the so-called presents into past clients. I happen to think that that's an improper categorization, but it is one that could plausibly be maintained. If one viewed it that way, then the present clients became past clients and the question would be: Is anything involved in representation of the future claimants inconsistent with the interests of the past clients? And my answer to that would be no. The situation there is as though a plaintiffs' lawyer represented someone with a claim against, say, take a hotel fire, for example, claim 1, settles that, is the lawyer disqualified, in virtue of that, from taking on claim 2 arising out of the same general set of -- set of circumstances? I take it it's clear that at least in the absence of circumstances not present here that there's no prohibition on that. Now, another way to look at it is --

THE COURT: Your opinion would be -- is that equatable to lawyer with claim 1 settling claimant 1's case conditioned upon the hotel settling with everybody else and then starts negotiating for claimant 2?

THE WITNESS: I was going to come to that. The first one I was saying is: Are we talking about assume there's no condition? The situation would be you're representing claimant 1, seal that one off, start the next one. You're representing claimant

No. 2 out of the same transaction. Is there any conflict there? My answer is no. It's done all the time.

Next question is: Well, assume that there is something built into the settlement of No. 1 that relates to the disposition of No. 2. And one could imagine various situations in which there might be a conflict resulting from that nexus.

The question is: Does the connection that's involved here create any such incentive on the part of the Ness Motley folks, having settled on this conditional -- in this conditional way the claim in behalf of the presents, is there anything about that claim, that resolution, that impairs their ability to represent the futures adequately?

Now, in my opinion, as I understand what Ness motley 2 said, was that if there were a court-approved global, meaning a settlement of the futures claim, which means a claim -- a settlement that is fair, reasonable and adequate for these future folks, that would engage, kick in, trigger the cash benefits that were a conditional part of Ness Motley 2.

Now, that's an oversimplification of exactly what it is, but the resultant of that is that there is an incentive vis-a-vis the presents to get an appropriate settlement in the futures, so that the interests are synergistic or compatible and not hostile.

An correlatively, there's no drag on the representation of the futures in virtue of this. Indeed, you might say that there was an incentive to the lawyers if they could get a fair and reasonable settlement. The futures, because it would then mean that they were going to get a cash enhancement of the prior settlement, so that they had an incentive in either event to -- to do well for the futures class.

That's the way I understand the structure. And therefore the interests were, as I say, synergistic rather than being inhibitory or constraining.

Q. When you say "synergistic," you mean the interests of th Ness Motley claimants in getting the back-end or the second 50 percent of the settlement through, which would be dependent

upon the global being done and receiving court approval, and the futures getting a settlement done which would receive court approval? Is that what you mean?

A. I mean that they were reinforcing, yes.

Q. In considering the context of the Ness Motley 2 agreements requirement that a global or any of these other triggers -- I think there was another trigger for trilateral -- required court approval, about the global, do you have any understanding that that was calling for a class action type of mechanism?

A. I think that's the only way you could imagine settling the global. And it's clear from Mr. Wachtell's stated position at an earlier point in the negotiation that some such arrangement was necessary from the point of view of Continental inasmuch as we had no enumeration or list or census of all the claimants, inasmuch as the position of the defendants was: We'll consider these discussions if we're looking to total peace. That necessarily means peace vis-a-vis people who are not presently enumerated. And that means you're talking about a class. So -- and that means you're talking about Rule 23. And that means, therefore, in a sense this is a kind of a compression of what the discussion is, that you're going to have a hearing before a court, as we now are, in which the whole process is scrutinized and the fairness of the settlement is subject to judicial review.

Q. As well as the adequacy of representation? Is that subject to review as well?

A. That's a part of the review required under Rule 23.

Q. Let me move forward to the next chronological period of time from August 9th, 1993 to August 27th, 1993, that date being the date the record will reflect -- will you get Professor Hazard some water, please -- that being the date that the California court had scheduled final arguments in the coverage case. Let me stay first with the appointment by this court of the four individuals as class counsel on August 9th, just stay with that for a moment. Do you have any view as to whether or not there was anything improper in these four individuals accepting that appointment?

A. No, I think it was entirely proper. Ness Motley is a very well-known, very experienced, very competent, aggressive law firm that's long been in asbestos litigation.

Thank you very much, Miss.

Casein and Wartnick have had long experience in the prosecution of claims, particularly against Fibreboard. I happen to be a member of the California Bar, and I know Mr. Wartnick's firm from a long time ago, and I know about Mr. Kazan, and they're certainly well-respected lawyers.

I think it was very important to -- I disagree entirely with Professor Leubsdorf on this point. I think it was very important to have people who had established competence and standing in asbestos litigation. I won't reiterate the elements of experience, knowledge, background. This is an extremely complex subject that takes intensive engagement to -- to understand and appreciate. I think those folks did so -- I think you have a problem of visibility. This is a public event, not just private litigation. And in my opinion, these lawyers enjoyed standing among their peers, they enjoyed standing among, for example, the labor organizations with whom many of the working folk were associated, so that they were people in whom relevant constituencies would have reason to have confidence. And that radiates on its effect on the futures clients.

Or, to put it differently, if you picked somebody who didn't have that kind of background, I think that it would have been an invitation for bitter sort of criticism and -- and jeopardizing any effort at serious negotiation.

Q. Now, this third chronological period, August 9th through August 27th, was a very short period of time, 18 years.

A. Yes.

Q. Does that factor in any way impact on any of your opinions here?

A. I will say that I think it was somewhat surprising that the people could, as it were, get their acts together in that short time.

On the other hand, the people who were participant in this were, with the exception of the Wachtell firm, long-term players in this. The Wachtell firm had been an active participant now for six months. I can tell you from my own observation that that's an extremely competent firm who had great experience in class suits, in complex transactions, so that in terms of that aspect of it they brought something to the party that was of comparable professional standing.

So here you have on this day, with the -- with the fate of the California litigation

Testimony of Geoffrey Hazard, expert on legal ethics Tr. 2334-2336

on August 27th, 1993?

A. August 26 and 27th, as I understand, the folks met at the courthouse and they were invited out to the judge's house. They met together, they met separately, they deliberated and they converged. And in my observation of law practice in various settings, that's typical of the way settlements finally happen. The judge was trying to exercise a benign influence on them; but as I understand it, this was direct negotiations and they moved around. I think the defendants came up with some more money beyond what they've had already come up with, and finally people say, "Yeah, okay." And that's a magic moment in settlement. You never know quite when it's going to come.

QQ. Now, Professor Hazard, you saw in both the depositions as well as the testimony yesterday of Professor Leubsdorf that he took a position that there was a conflict of interest between the interests of what he referred to as the Ness Motley back-end claimant situation, i.e., the need to get some sort of a trigger to get the back-end going, and the interests of the futures. And I think he framed it in terms of, one, the back-end Ness Motley simply wanted some deal done, they didn't care what it would be, just as

long as it was done, and the futures would want, in his view, the very best deal that could be done. Now, do you see any conflict there or any differing of interests that would create any conflict?

A. No. I don't know why it wasn't consistent with the interests of the futures class to get the best deal you could get, whatever that is. I mean, it assumes that you can define that apart from the process itself, which I think is just fantasy. The best deal is what seriously-intended, competent people can get. And you can always second-guess a deal to say, "Well, you could have gotten more." Well, yeah, maybe you could, and maybe you could have gotten a lot less, too. So I think the notion of a best deal is aspirational rather than definitional.

Now, on the other side, the -- the -- the presents have in mind that the deal has got to pass muster. And I think that it's too easy to trivialize what it takes to pass muster. And I think it's too easy to trivialize the serious concern of the plaintiffs' lawyers. These were people who had deep attachments not only to specific individuals as their clients but to a sense of cause. They're concerned for these folks. And so you have to say that these guys were suddenly going to be patsies or relax or go limp or something or other, on the one hand, and that they were oblivious to the fact that they were going to have to stand up here in court and justify their conduct. So I think that both on, if we can say, financial economic interests and psychological grounds as well as just considerations of elementary responsibility that the concerns -- the interests of the two groups were essentially reinforcing.

Q. So am I correct, sir, that through, let's say, August 27th, the third of the three time periods we've discussed so far, you do not see anything where any of the conduct of any of these four individuals violated any ethical rules? Is that correct?

A. I do not. I think they -- I think every indication is that they were doing the best for now their clients the futures in the circumstances which were severely constrained by the circumstances I've described, particularly the California litigation.

Q. Is it relevant to you -- and you referred to this, so maybe it is -- the fact that at the last moment, on August 27th, these four individuals in discharging their obligations were able to get a little bit more money onto the table, another —

Testimony of Geoffrey Hazard, expert on legal ethics Tr. 2374-2376

until you start working.

Q. All right. Well, let's turn to tab No. 10, if you would, please, sir.

A. All right.

Q. Tab 10 is a letter dated November the 25th of 1991, it's on the letterhead of Caplin & Drysdale, it's from Mr. Inselbuch, and it's addressed to Mr. Snyder, and attached to it is what unfortunately is smudged out here, but it's entitled Term Sheet, and it talks about the settlement classes, the amount of money to be paid for each class of settlement and various other aspects of the proposed settlement with -- for a class of future claimants. At that time, August -- November the 25th of 1991, was there an attorney-client relationship between these lawyers who are now class counsel and a class of future claimants?

A. No.

MR. BSCHORR: Objection.

MR. WACHTELL: Your Honor, to the extent that the question presumes that it referred to a class of future claimants as distinct from both presents and futures, I think it is inaccurate based on the document itself.

THE COURT: Was your question restricted to futures?

MR. BARON: Well, futures are certainly being settled by this letter. And, yes, it was restricted to futures.

THE COURT: Go ahead.

A. Wait a minute. They aren't being settled. This is a proposal to talk about the terms. Okay?

MR. BARON:

Q. Okay.

A. Of course at this time they has present clients, if that's the question.

Q. But that's not the question. The question is: Did they have future clients?

A. No.

Q. So when you're saying, then, it was okay as far as you're concerned for these lawyers to make a settlement offer to settle for a group of individuals that they did not yet present?

A. That's what you have to do when you're exploring a possibility of a futures class.

Q. All right. So when you explore the possibility of a futures class, you can make settlement demands and still not yet have a fiduciary responsibility for the class?

A. I didn't say that. That's a distortion of what I said. I said they had a fiduciary responsibility.

Q. I'm sorry. I misunderstood you. So there, then, was a fiduciary responsibility that was now extant on November the 25th of 1991?

A. I think that's a fair statement, yes.

Q. All right. And can you describe for me what the nature of that fiduciary responsibility was?

A. To serve faithfully without conflict of interest and competently and with -- with reasonable energy.

Q. Okay. So they had those obligations, you believe, at least by November the 25th of 1991?

A. Yes. There's very great difficulty in visualizing this is a complete relationship. I'm quite uncertain about the beneficiaries and so on. With that said -- and it's also difficult to figure out what would constitute conduct constituting a breach. With those ambiguities in mind, I think there was a fiduciary duty.

Q. Now, do you believe that on November 25th of 1991, these lawyers, class counsel, had reason to believe that there may

not be enough money to go around for both the present claimants and the future claimants?

A. I don't know the answer to that question.

Testimony of Geoffrey Hazard, expert on legal ethics Tr. 2382-2385

A. Some large sum.

Q. And that $200 million or so came from, in part, what might otherwise be considered coverage of Fibreboard?

MR. LOCKWOOD: Objection, Your Honor. The hypothetical had to do with what happened to the futures since the coverage case was lost and which by definition had not occurred at the time of Ness Motley. This is a totally incomprehensible line of questioning.

THE COURT: Well, I've suffered through other incomprehensible lines of questioning, and I'll give counsel latitude here.

[Laughter]

MR. BARON:

Professor Hazard, would it be fair to say that every time that Ness Motley settled a case for their present clients after November 25th, 1991, they were potentially taking money out of the pockets of future clients?

A. In the way which you have described that, there's a way which that could be true, yes.

Q. Okay. And wouldn't that then mean that there was a conflict between those two groups?

A. No.

Q. In competition for funds?

A. No.

Q. So even though by settling present claims for present claimants, Ness Motley was depleting the available assets of Fibreboard while they were simultaneously --

A. That's a false statement. They weren't depleting the assets of Fibreboard, they were availing themselves of money that the insurance companies were willing to part with pending the litigation of the coverage case.

Q. Right. And that was not, in your opinion, an asset of Fibreboard, the coverage that was there?

A. It was a contact claim, but it was one that was in litigation.

Q. Well, did you assume at any point in time for purposes of your analysis here that there was a certain price beyond which Continental would never pay to resolve the entire matter?

A. Sure.

Q. So there was a reserve price as such?

A. Everybody has a reserve price.

Q. And in the completion for the use of that price, would you agree with me that presents were competing with futures?

A. In that sense, it's true. That is, if you -- if the reserve price was such that there was some possibility that the money would not be available to pay all the claimants, then there was that risk.

Q. Okay. Now, I asked you whether there was --

THE COURT: Just a minute. So do I follow your answer to be that whether or no there's a potential ethical violation depends on the reasonableness and fairness of the amount negotiated?

THE WITNESS: Absolutely.

MR. BARON:

Q. That's your opinion, whether or not there's an ethical violation depends upon the reasonableness of the settlement? Is that right?

A. It depends -- I think the judge said -- I think I heard him to say the circumstances. That is, the conflict of interest is a real-

world concept, not a theoretical concept. Therefore, one has to consider the real-world circumstances. Economists do a lot of thinking about -- how shall we say? -- the potential of reality. A reserve price in the context of real-world negotiation is an imaginary number. The person who offers the money finally doesn't know what he is going to offer until he offers it. He may have

Testimony of Geoffrey Hazard, expert on legal ethics Tr. 2388

THE COURT: I t appears to me it's beyond the -- certainly beyond the reason the witness is here, but tell me what you're after, counsel.

MR. BARON: Your Honor, I want to know if this witness believes that there was a time during the negotiations where it was believed by counsel that there would not be enough money to go around and that they just had to take what was there based on the review of this.

THE COURT: Go ahead.

A. I didn't see any indication that plaintiffs' counsel through that they could not get sufficient money to handle the claims of the presents and the futures.

MR. BARON: Okay.

Q. So, it's your view and you base your opinions on the fact that counsel in this believed throughout that they would settle only if they got a hundred cents on the dollar for what they thought was a fair settlement for their presents and for their futures?

A. I regard that question is incompetent, frankly, Mr. Baron. A hundred cents on the dollar means one thing, fair means something else in this context.

Q. All right. Well when a lawyer represents a

Testimony of Geoffrey Hazard, expert on legal ethics Tr. 2389-2390

client, a lawyer has a duty to evaluate the client's case and to attempt to get a fair value for the client?

A. Indeed.

Q. And that's true if you've got one client or if you've got a thousand clients?

A. That's right.

Q. And the lawyer's duty changes, does it not, if it turns out that the defendant is not going to be able to have enough money to pay what is a fair settlement?

A. No.

Q. If there's multiple claimants.

A. The lawyer's duty is the same. The reality is different.

Q. Okay. Well, to your knowledge, did the reality ever occur here to the plaintiff's lawyers that there would not be enough money to pay all future claimants?

A. They confronted a situation in which there was an external event creating a severe risk that that could happen. If Fibreboard won the coverage litigation without qualification as to the extent of the coverage, then there was enough money to the extent of the insurance company's resources, which I take it were for practical purposes without limit, that is, they would have to charge present policyholders to pay the money, but presumably if they stayed in the business they could do that.

Q. So there was no artificial limit on the amount that the insurance companies could pay to settle this case, is that right?

A. That's right. But there was a pending matter that would result in there being no insurance money.

MR. BARON: I understand that.

THE COURT: How much longer do you expect?

MR. BARON: Just a few, Your Honor. Getting close. Unless the court wants to take a break. I've probably got 10 minutes.

THE COURT: Go ahead.

MR. BARON:

Q. Professor Hazard, you have not formed an opinion on whether the court should approve this settlement, have you, sir?

A. That's outside the scope of my responsibility.

Q. Right.

A. Professor Hazard, the proceeding here to attempt to resolve these questions is not analogous, is it, to an in rem proceeding in terms of

Testimony of Geoffrey Hazard, expert on legal ethics Tr. 2396-2397

Q. What would be the circumstances?

A. Is the settlement value was out of the range, if there were other agreements between counsel that created an adverse incentive on the part of counsel, those are circumstances. There weren't any of those here.

Q. Well, if it was out of the range, it wouldn't be within the range, which is what the hypothetical assumed, that it was in the lower range as opposed to the higher range.

A. You're presupposing that we can state in the beginning a definite lower range boundary. That's an idea. Here we happen to have some pretty good idea, because you've got a substantial history. But I don't know how you could write down the lower end of the range of reasonable settlement if $3,433. That's just an idea.

Q. Right. And do you subscribe to Professor Leubsdorf's view that's one of the reasons why we have the conflict rules, that if there is a possible conflict there that counsel needs to be disqualified, because you could never go back and figure out whether it was a good deal, bad deal or otherwise?

A. I agree with what Professor Leubsdorf said in that respect; I don't agree with that summary of it.

[Laughter]

Q. Do you agree with this statement? "A settlement class suit is a proceeding brought after negotiations have been concluded between plaintiffs' representatives and the defense in which the purpose and effect of the suit is not litigation but a binding judicially-approved contract that will govern all future cases"?

A. Yes.

Q. You wrote it, didn't you?

A. It sounded awfully good to me.

[Laughter]

MR. BARON:

Q. Do you believe that this case, as you've reviewed it and spent all the time that you have spent on it, has for its purpose not litigation but a binding judicially-approved contract that will govern all future cases?

MR. LOCKWOOD: Objection, Your Honor. This witness has not been called to testify on that subject.

A. The answer is sure. What else are we doing here?

MR. BARON: That's all I have, Your Honor.

Testimony of Geoffrey Hazard, expert on legal ethics Tr. 2399-2400

question of whether you would need to have separate subclasses and the global was then going to be negotiated?

A. I think that if it was within the range that plaintiffs' counsel could reasonably negotiate, it might have been an occasion for asking for subclasses, but I think that would have been a mistake.

Q. And the fact that the $2 billion would be made available without differentiation in the trilateral would be a relevant factor in that consideration?

A. I think it fulfills a fundamental principle of fairness counsel could take into account. The class pre and post would take it into account.

Q. I have one other question. And this goes to your concept of reserve price and economic model and the like. Directing your attention to where the insurance companies stood on August 26th of 1993, where the Ness Motley 2 was a matter of history and already had been done, would you agree that at that point, still facing the risk of loss in connection with the coverage litigation, that they essentially had to appraise independently in deciding what they were willing to pay to settle the futures class, what they were willing to pay on the one hand as against the consequences of not entering into that agreement on the other?

A. Sure. They had already entered into one agreement. The question is: Should we put some more money on the table to get further peace?

Q. And no matter what their druthers might have been as to an overall price, they had to make a new economic decision of what made sense with respect to this outstanding liability; is that correct?

A. It's a different claim. Absolutely.

MR. WACHTELL: No further questions, Your Honor.

THE COURT: We have Mr. Sweeney left this afternoon. Who else this afternoon?

MR. BARON: Housekeeping, Your Honor.

MR. MILLER: Your Honor, we will probably have some rebuttal testimony, I suppose, we might call it, from Mr. Snyder, very briefly, and, of course, we will have Mr. Vasquez tomorrow morning.

MR. KRISPIN: Your Honor is aware of our intent to call -- recall Mr. Snyder. And I believe --

THE COURT: That's in Rudd, counsel. As I understood it.

MR. KRISPIN: Well, there is one very

Testimony of Stephen Snyder, Fibreboard counsel Tr. 2699-2703

That's all I have.

THE COURT: When we come back, you have two questions?

MR. BARON: Well, Your Honor, two or three. He did raise two or three questions.

THE COURT: All right, Mr. Baron. Let's get it over with.

MR. BARON: I'll do it as quickly as I can, Your Honor.

CROSS EXAMINATION BY MR. BARON

Q. Mr. Snyder, I wanted to follow up on an answer that I think was cut off in midstream. You've testified that victims under the trilateral might well receive less money from Fibreboard but that did not mean necessarily that they would receive totally less money.

A. That's correct.

Q. And could you explain what you meant by that? I don't believe it's clear in the record.

A. Talking about an individual case or gross basis? On an individual case, if Fibreboard is in a jurisdiction where it's a minor player, historically the plaintiffs' lawyers know how to get adequate compensation for their clients from the existing stable of defendants. And I'm assuming that that won't change, although if bankruptcies occur the total number may go down. Fibreboard will pay its share in its home jurisdictions, it just wants to pay a fair diminished share in other jurisdictions. So on an individual claimant basis, I would assume that the claimants are going to get the same amount of money for their clients. On a gross basis, it's very clear that if Fibreboard is able to convince the plaintiffs' lawyers that it's acting responsibly and that it does want to spend money on claims rather than defense costs, that it can bring more money into the system for claims, even though the individual case averages might be lower.

Q. But, Mr. Snider, you would agree, would you not, that if the global is disapproved and the trilateral goes into effect, that in terms of the amount of money each victim will receive in the total category of his asbestos claim, it really wont change any?

A. I don't believe it will.

Q. All right. Now, Dr. Peterson testified that the trilateral funds would run out within seven to nine years. And again you started to respond to that. What's your belief about the likelihood of that occurring?

THE COURT: He stated it wasn't going to happen. He stated he disagreed with it.

A. Even if Fibreboard misbehaves and miscalculates in the tort system, it can husband and conserve and keep those funds for longer than seven to nine years. If Fibreboard can even get close to the five to six thousand dollar case average that I'm talking about, and that we're already pretty close to in 1994, we're talking about two decades, three decades, a long time.

MR. BARON:

Q. Okay. Now, there was discussion of Owens-Illinois, and you brought up this chart that was shown to us that Owens-Illinois over the last two years has disposed of about 70,000 claims. Do you know how much Owens-Illinois spends each year on defense costs?

A. No, I don't.

Q. There were documents that were placed in evidence earlier showing that OCF spent in the range of 55 to 60 million dollars per year over the last two years. Do you know of any defendant in the asbestos litigation that spends more money than that per year defending asbestos claims?

MR. WACHTELL: Objection to form. That was as to outside counsel costs.

MR. BARON: Right, as to outside counsel costs.

MR. INSELBUCH: And uninsured. Also referred to uninsured costs.

MR. BARON: No, it did not.

THE COURT: Can you answer the question?

A. Some of the claims facilities -- no. I don't know of any other thing. The answer is no.

MR. BARON:

Q. Is that the high end of the spectrum?

A. I don't think it's the high end of the spectrum, no.

Q. Do you know of anyone that's higher than that?

A. I don't know of anybody that's spending -- that spent more than 55,000 dollars on their defense in the year that OCF spent $55,000 on their defense.

Q. I think you mean million.

A. 55 million, yes. I know of defendants, including OCF, that have spent a lot more in years when they were really in distress or they felt they were in distress and were vigorously defending cases.

Q. And "in distress" means no funds or inadequate funds to settle claims?

A. No. It means going through a difficult transition, which is what Fibreboard will go through, I think, if it ends up with the trilateral funds, as it did when it came out of the asbestos claims facility. Remember, Fibreboard only 50 to 60 million dollars. But that was part of a program where it was only spending about 20 to 24 on indemnity. It was two to one at that point.

THE COURT: Gentlemen, I've heard enough. When we come back, we'll take care of the housekeeping matters, and then the court's interested in hearing the report from the guardian.

[Lunch recess]

THE COURT: On some of the continuing matters, the court sustains the objection to the tender of the Kane transcript. The court is inclined to grant the motion for intervention under Rule 24(b) filed by the

(19)

No. 97-1704

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1997

ESTEBAN ORTIZ, ET AL.,
Petitioners

v.

FIBREBOARD CORPORATION, ET AL.,
Respondents

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONERS

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August 6, 1998

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

63 pp

QUESTIONS PRESENTED

1. May the Fed.R.Civ.P. 23(a) requirements of commonality and typicality be met in a Rule 23(b)(1)(B) class action, despite this Court's holdings in *Amchem Products v. Windsor*, by reference to a proposed settlement when the claims alleged in the complaint share no common or typical questions of law or fact, and may such a class be certified under Rule 23(a)(4) despite the existence of structural conflicts of interest—including a conflict between presently injured and future claimants, the same conflict condemned by this Court in *Amchem*?

2. Despite the Rules Enabling Act, the Rules of Decision Act, the teachings of *Amchem* and principles of federalism, may a federal court certify a class action under Rule 23(b)(1)(B), premised upon a "limited fund" contrived by a settlement between the parties, to circumvent the Bankruptcy Code and to alter the substantive state law rights of absent class members?

3. Does the Due Process Clause:

(a) permit a federal court to bind absent class members (including residents of the state where the action is brought) to a class action judgment that alters their *in personam* claims for money damages without giving them a chance to opt out of the class?

(b) permit a federal court sitting in diversity to exercise personal jurisdiction over class members asserting *in personam* claims for damages without giving them a chance to opt out, when those class members lack minimum contacts with the forum state?

4. Can class notice sufficient under the Due Process Clause and Rule 23(e) ever be given to a class that includes unknowing, unidentifiable potential future asbestos victims who have no perceptible injury at the time of the class settlement and notice?

5. Does a federal court have power under Article III to adjudicate a "case" brought by plaintiffs who do not in good faith plead claims they intend to litigate, but who bring suit as a friendly joint venture with the defendants solely to provide a jurisdictional hook on which a federal court agrees to hang a tort reform proposal displacing the laws of 50 states?

PARTIES TO THE PROCEEDING

The petitioners in this case are Esteban Yanez Ortiz, Edee Cochran, Lester E. Taylor, John Allgood and Henry Evers. The defendant is Fibreboard Corporation. The plaintiff class representatives are Gerald Ahearn, James Dennis, Charles W. Jeep, James Ellison, and William Mitchell. The insurers who intervened below are Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company, and Pacific Indemnity Company. The other parties below were Roland Dearborn; Judith Dearborn; Kerwin Butcher, Director, Office of Workers' Compensation Programs, U.S. Department of Labor; James Flanagan; David Middleton; Owens-Illinois, Inc.; Bethlehem Steel Corporation; Kenneth Smith; Plant Insulation Company; and Safety National Casualty Corporation.

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OPINIONS BELOW

The opinion of the court of appeals after remand (Cert. Appendix 1a)[1] is reported at 134 F.3d 668. The order of this Court vacating the original judgment of the court of appeals (CA 36a) is reported at 117 S.Ct. 2503. The original opinion of the court of appeals (CA 37a) is reported at 90 F.3d 963. Its opinion denying rehearing en banc (CA 546a) is reported at 101 F.3d 368. The district court's opinion approving the class settlement (CA 183a) is reported at 162 F.R.D. 505; its findings of fact (CA 243a) and conclusions of law (CA 469a) are not reported.

JURISDICTION

The judgment below was entered on January 27, 1998. CA 3a. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Pertinent portions of Article III of the U.S. Constitution, the Due Process Clause of the Fifth Amendment, the Rules Enabling Act, 28 U.S.C. § 2072, the Rules of Decision Act, 28 U.S.C. § 1652, and Fed.R.Civ.P. 23 are set forth at CA 550a-51a.

STATEMENT OF THE CASE

The court below held that a nationwide, future-claimant, settlement-only, mandatory class action may be employed to alter the substantive state-law rights of absent class members if the settling parties negotiate what the court called a "limited fund"—a fund limited only by what the defendant, solvent but claiming a risk of future insolvency, and the defendant's insurers, are willing to pay now to resolve its entire future stream of tort liabilities.

1. Background and Settlement Negotiations. This is a mass tort class action involving asbestos personal injury claims against Fibreboard, but it didn't start out that way. It arose out of an entirely separate insurance coverage dispute in a California state court

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[1] Citations to the appendices to the Petition for Certiorari will be styled "CA __a"; to the Joint Appendix, "JA__"; and to Class Counsels', Fibreboard's, and the Insurers' Briefs in Opposition, "Class BIO", "Fibre.BIO", and "Ins.BIO" respectively.

between Fibreboard, which had manufactured asbestos-containing products for fifty years (CA 38a), and Continental Casualty Co. ("Continental") and Pacific Indemnity ("Pacific")("the Insurers"). Continental and Pacific had written insurance policies for 1956 - 1959 with "no aggregate limit" on asbestos-related liability (CA 267a)—thus providing an *unlimited* insurance fund for claims covered by those policies.[2] Although the Insurers disputed coverage for Fibreboard's liabilities, in a series of rulings from 1985 to 1990 the California trial court rejected all of the Insurers' defenses. CA 268a-69a. After the class action settlement in this case was negotiated and approved by the district court, the California appellate courts finally resolved most of the contested coverage issues in Fibreboard's favor. CA 271a.[3]

Presented with this prospect of virtually unlimited insurance coverage under the disputed policies, Fibreboard established a "corporate goal" of protecting its shareholders' equity by "resolv[ing] its asbestos liabilities within its available insurance resources." CA 577a. To this end, in 1991 Fibreboard solicited several nationally prominent asbestos plaintiffs' attorneys (hereafter, "Class Counsel")[4] to negotiate a "global" solution to all of

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[2] Thus, while Fibreboard by 1988 had exhausted its insurance against claims by those first exposed to asbestos after 1959, other claimants potentially could draw upon an insurance fund that was uncapped and in no sense "limited." Due to this lack of insurance for post-1959 claims, after 1988 Fibreboard settled such cases for considerably less than pre-1959 claims. CA 148a-49a (Smith, J., dissenting).

[3] *See Armstrong World Indus. v. Aetna Cas. & Sur. Co.*, 45 Cal.App. 4th 1, 52 Cal.Rptr. 2d 690 (Cal.Ct.App. 1996), *review denied* (Aug. 21, 1996). Before that judgment became final, the Fifth Circuit effectively mooted the coverage litigation with respect to Fibreboard, Continental and Pacific by approval of the "Trilateral Settlement Agreement" in the case of *Continental Casualty Co. v. Rudd*. CA 93a-98a. As described below, the Trilateral Agreement compromises Fibreboard's coverage dispute independent of the class settlement in this case. The California coverage case continued despite this class settlement because it involved a number of other asbestos defendants and insurers.

[4] Harry Wartnick, Steven Kazan, Joseph Rice, and Ron Motley. Joseph Cox, a partner of Messrs. Rice and Motley at the Ness, Motley firm, later took Mr. Motley's place. The Ness, Motley firm also served as class counsel in the *Amchem* case. The four plaintiffs' attorneys retained Elihu Inselbuch of Caplin & Drysdale to represent them. CA 200a.

Fibreboard's asbestos liabilities for all time. Global negotiations did not go well, but in 1992 Fibreboard settled 20,000 existing claims with Class Counsel without paying any of its own money, by assigning to the plaintiffs Fibreboard's rights under its Continental insurance policy. CA 42a. Class Counsel and Fibreboard also discussed using this same device to settle all future asbestos claims. Fibreboard then brought suit in the Eastern District of Texas seeking a ruling that these assignments to Ness, Motley's individual clients did not violate the Continental policy, which is how the *dramatis personae* in this case came before Judge Robert Parker, then Chief Judge of the Eastern District of Texas. CA 42a.

Continental did not take to the idea of Fibreboard assigning benefits under its liability policies without its involvement, so in March 1993, Continental began participating in these global negotiations. CA 42a-43a. Thus the negotiations between Class Counsel and Fibreboard to resolve asbestos claims expanded to become negotiations among those parties and Continental to resolve both its coverage dispute and Fibreboard's total asbestos liabilities. In August 1993, Pacific joined the negotiations.

While negotiating this global settlement, Class Counsel settled their entire outstanding inventory of about 45,000 existing asbestos claims in a separate side deal which paid "a higher-than-average value per claim," for a total of approximately $470 million, with half of the payment "contingent on the outcome of the [insurance] coverage case or on the existence of a settlement." CA 45a n. 3; JA 119a.

On August 9, 1993, Judge Parker issued an order directing Class Counsel to "negotiate [with Fibreboard] the prospect of a Rule 23(b)(1)(B) settlement class composed of future plaintiffs with claims against Fibreboard." CA 45a; JA 289a-290a. Thus, before a lawsuit was even filed, Judge Parker had appointed Class Counsel and had directed them to negotiate a class action settlement with the defendant on behalf of unknown "representative" plaintiffs to be named later. In the summer of 1993, Continental agreed to pay Class Counsel to file a class action against Fibreboard: 3% of any settlement would be paid to Class Counsel as attorneys' fees if

approved by the court. CA 429a. Class Counsel refused to agree to a global settlement resolving all of Fibreboard's asbestos liabilities unless Fibreboard and the Insurers first separately settled their coverage dispute; this back-up agreement ensured the availability of a large sum of money for asbestos claims if the global class action foundered in court. JA 255a; CA 46a-47a.

On August 27, 1993, Fibreboard, the Insurers and Class Counsel announced the key terms of their proposed "Global Settlement" of all future asbestos claims, which required the Insurers to pay $1.525 billion into a settlement trust (CA 46a-47a, 49a) and which ultimately yielded fees of $43.7 million for Fibreboard's hand-picked Class Counsel. CA 541a. The Global Agreement releases Fibreboard and the Insurers from all future asbestos liability and redirects future claims to the settlement trust.

Also on August 27, the Insurers and Fibreboard announced the back-up "Trilateral Agreement" in which they independently agreed to resolve their insurance coverage dispute with respect to *all* asbestos claims, both present and future, *whether or not the Global Settlement of future asbestos claims received court approval*. CA 46a-47a. The Trilateral Agreement provided that, if the Global Settlement were not approved by the courts, the Insurers would pay Fibreboard $2 billion, which Fibreboard could then use (in addition to its own assets, valued at $235 million by the district court in 1994[5]) to resolve all future asbestos claims. CA 51a.[6]

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[5] Fibreboard was acquired in 1997, subsequent to the Fifth Circuit's original decision, by Owens-Corning in a tender offer for $515 million cash, which could expand enormously the assets available to pay Fibreboard's future asbestos liabilities. CA 10a n.11; 13a-14a (Smith, J., dissenting).

[6] To lock in the Trilateral Agreement, the Insurers filed suit against a defendant class of "future" asbestos claimants seeking a declaration that this agreement was fair and reasonable with respect to the defendant class members, who are the potential third-party beneficiaries of the liability insurance policies. *Continental Casualty Co. v. Rudd*. The defendant class in *Rudd* has essentially the same members as the plaintiff class in this case. In *Rudd*, the district court approved the Trilateral Agreement; Petitioners neither objected to that agreement nor appealed from the district court's judgment. Although the Fifth Circuit consolidated *Rudd* with this case, following issuance of the panel's decision in the two cases *Rudd* was severed. No party sought rehearing of the *Rudd* decision or review by this Court, and the *Rudd* judgment is now final.

2. The "Class Action." On September 9, 1993, the settling parties filed the complaint in *Ahearn v. Fibreboard Corp.*, No. 6:93cv526 (E.D. Tex. 1993), the class action "lawsuit" they had "settled" two weeks earlier. CA 552a. Invoking the court's diversity jurisdiction under 28 U.S.C. §1332 (CA 553a), the complaint alleged claims on behalf of all those who had been exposed to asbestos for which Fibreboard may be liable, but who had not filed (or had dismissed without prejudice) any asbestos-related lawsuit against Fibreboard prior to August 27, 1993. The plaintiff "class" also included anyone who ever was, *or ever would become*, a spouse, parent, child or other relative of any such exposed individual. CA 555a-56a. While the complaint sought damages for the proposed class only against Fibreboard, Continental and Pacific immediately intervened as defendants. CA 567a.

Simultaneously with filing the complaint, Class Counsel and the Insurers, pursuant to the district court's prior instructions, jointly moved for certification, under Fed.R.Civ.P. 23(b)(1)(B), of a mandatory, nationwide class of all potential future asbestos claimants against Fibreboard—including those who currently had no actionable asbestos-related condition. Future asbestos plaintiffs were thus included in the proposed class even if they had not yet sustained physical injury, had no accrued claims, and were protected by state laws from the running of statutes of limitations on any claims they might eventually develop.

No subclasses were created. For the few class members who had already developed an asbestos-related disease, the complaint sought damages for personal injuries. For all other class members—the overwhelming majority—the complaint pleaded "exposure-only" claims for increased risk of cancer, fear of cancer, and medical monitoring (CA 222a, 561a), but Class Counsel admitted under oath that, in their own words, they "certainly had no intention to file a contested or a litigated class action lawsuit against Fibreboard during this process." JA 128a. They further testified that, although they collectively had more than 50 years of asbestos litigation experience, prior to this class action none of them had ever filed *any* cases on behalf of "exposure only" asbestos plaintiffs. JA 129a; 172a-73a; 204a. Although their argument for subject matter jurisdiction and for "good faith" in pleading these exposure-only claims was predicated on the supposed availability of recovery for

such actions in California, where Fibreboard resides (CA 222a), Class Counsel testified under oath that they knew there is no cause of action in California for "risk of cancer" or "fear of cancer" "[i]n the absence of some physical injury." JA 172a.

Indeed, as both the Fifth Circuit (CA 183a) and the district court (CA 86a) recognized, those non-existent claims were pleaded in the class complaint simply to allow the district court to assert jurisdiction over the settling parties' previously negotiated agreement to resolve *future, unripe* personal injury claims over which the court concededly lacked jurisdiction. The testimony of the negotiators for each of the Respondents similarly revealed that, from the perspective of all participants, the class complaint was filed solely to allow the court to approve the settlement; none of the parties desired or anticipated an actual contested class action lawsuit on behalf of future claimants. JA 98a-99a, 292a. When asked if the purpose of this complaint and class action was "not litigation but a binding, judicially approved contract that will govern all future cases," Respondents' own ethics witness candidly replied, "[S]ure. What else are we doing here?" JA 370a.

3. **Class Counsel's Representation.** Class Counsel represented individual asbestos plaintiffs who were suing Fibreboard while concurrently negotiating a class settlement on behalf of future claimants. By defining the class to include only those who had not yet filed suit (but who may already have been injured), Class Counsel excluded their entire pre-existing client roster from a supposedly non-opt-out 23(b)(1)(B) class. CA 117a While the class negotiations were underway, Class Counsel settled their entire outstanding inventory of thousands of cases against Fibreboard for higher-than-average amounts, *contingent in part on the approval of a global settlement—on any terms—of all future claims against Fibreboard.* CA 142a-43a. Class Counsel thus had a huge "financial interest in settling the class claims on any terms whatsoever, even if those terms were unfavorable to the class." CA 142a (Smith, J., dissenting).

Moreover, conflicts of interest among certain sub-groups *within* the future claimant class rendered the representative plaintiffs *and* Class Counsel inadequate to represent the class as a whole. For example, there is a debilitating conflict between those class members who already suffer from asbestos-related disease, and those who will

not suffer such an injury until some point in the future—the very conflict that caused this Court to hold in *Amchem Products v. Windsor*, 117 S.Ct. 2231 (1997), that the class in that case had not received adequate representation. *Compare Amchem*, 117 S.Ct. at 2251, with CA 145a-48a (Smith J., dissenting) and JA 311a.[7] Finally, separate representation was also necessary inasmuch as Fibreboard was insured against the claims of pre-1959 class members but *not* the claims of those first exposed to asbestos post-1959, because prior to the settlement the claims of the former were far more valuable than those of the latter. CA 148a-150a (Smith, J., dissenting); JA 322a-324a.

4. **The Terms of the Global Class Settlement.** Although the class complaint of course alleged no unaccrued claims for future personal injuries, *the central feature of the Global Settlement is that all class members release those "claims."* The settlement provides that Continental and Pacific will contribute a total of $1.525 billion to a Trust to be established on behalf of all class members. Fibreboard will contribute a token $500,000 (out of its net worth of at least $235 million), plus $9.5 million remaining from another liability insurance policy (JA 84a), for a total fund of $1.535 billion. In return, Fibreboard is forever released from all lawsuits class members might bring in the future, and the Insurers are released from any responsibility for defending against or indemnifying such claims. CA 49a-50a.

This release of unripe future claims provides the means for Fibreboard to achieve its "corporate goal" (CA 577a) of resolving its asbestos liabilities entirely within its available insurance policies. Because the class was certified as a mandatory class under Rule 23(b)(1)(B), class members were given no opportunity to exclude themselves from this compulsory release of their as-yet unaccrued claims. The Global Settlement extinguishes class members' claims even if they received no notice of the settlement and hence were unable to object to it in a timely manner, even if they objected

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[7] Although all class members are "future" *claimants* in the sense that they had not filed or settled an asbestos-related personal injury case against Fibreboard on or before August 27, 1993, many class members have developed personal injuries since that date, and others had developed disease prior to that date but had not yet filed or settled a lawsuit.

vigorously and tried to opt out, even if they were unaware of their own exposure to asbestos or of the past exposure of whoever would someday become their parent or spouse, and even if they were not among the tiny fraction of the class that had yet suffered any injury.

In return for this forced release of all future, unaccrued claims, class members are given the opportunity, if and when they develop asbestos-related disease, to present their claims through the Alternative Dispute Resolution ("ADR") provisions of the Trust Distribution Process ("TDP"). CA 583a. Once a class member submits a claim and furnishes all necessary information to support it, the Trust will evaluate the claim and offer a settlement. CA 584a. If the class member accepts the offer, she will be paid in three annual installments—40 percent in the first fiscal year after the offer has been accepted, 30 percent in each of the following two years. CA 605a. If the class member rejects the offer, she may proceed to mediation, non-binding arbitration, and finally a mandatory settlement conference. CA 584a.

Only after enduring all of these delays may a class member finally file a lawsuit against the Trust—and, even then, the Global Settlement imposes significant limitations on that lawsuit, saddling it with what the Fifth Circuit called its "spendthrift provisions." CA 49a. Class members cannot recover punitive damages or pre- or post-judgment interest. CA 584a. They are limited to $500,000 in compensatory damages, no matter what damages are assessed by a jury. CA 607a. Even in jurisdictions where the governing substantive law provides for joint and several liability, class members are limited to the portion of liability assigned to the Trust, which stands in the shoes of Fibreboard for purposes of trial. CA 584a. The settlement penalizes any class member who ultimately prevails in court by spreading payment of the judgment in installments over five to ten years, without interest (as compared to the three-year payout for claims resolved by arbitration or settlement before resort to the judicial system). CA 605a-606a.

In contrast, the back-up Trilateral Agreement would not restrict the legal rights of asbestos victims in any way, because all it would do is resolve the coverage dispute and discharge the Insurers from further obligations under the Fibreboard policies. CA 51a. The

Trilateral would simply provide Fibreboard with $2 billion to pay future asbestos claims; plaintiffs would sue Fibreboard as usual.[8]

According to Fibreboard's representations to its shareholders in 1993 (reiterated under oath in this case), the monies in the Trilateral Agreement would be sufficient to "resolve all [of Fibreboard's future] personal injury asbestos liabilities" (JA 1014a; *see also* 40a, 122a-23a), and the Trilateral alone would allow Fibreboard to survive "indefinitely," "[p]erhaps forever." JA 42a-43a.[9]

5. Disposition in the Courts Below. Petitioners Esteban Yanez Ortiz, Edee Cochran, Lester E. Taylor, John Allgood, and Henry Evers are all members of the plaintiff class who intervened in the district court on June 28, 1994, for purposes of objecting to the proposed class settlement. Mr. Ortiz and Mrs. Cochran are Texas residents, while Messrs. Allgood, Evers and Taylor are Alabama citizens who argued that the district court lacked the authority to exercise personal jurisdiction over them without their consent. The district court held a hearing on the fairness of the proposed class settlement but did not conduct a separate hearing on class certification.

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[8] The Trilateral Agreement also provided approximately another $1.3 billion to pay claims that Fibreboard had already settled but had not yet paid in full, including the mass inventory settlements made with Class Counsel as side deals. JA 86a. Fibreboard's counsel testified that the Trilateral was worth about $3.35 billion in total. JA 118a.

[9] The district court found (CA 279a-80a) that, as Fibreboard itself acknowledged, Continental and Fibreboard were unable to reach a bilateral settlement of the insurance dispute in 1993 *only* because (i) Continental's offer was not high enough, and (ii) Continental wanted Pacific to contribute to any settlement. The Global Settlement was not necessary to overcome either stumbling block. Indeed, in his testimony Fibreboard's counsel expressly *denied* that it was necessary to limit or extinguish the plaintiffs' asbestos claims against Fibreboard in order to settle the insurance dispute — the problem was that the Insurers were not then willing to write "a big enough check." JA 111a. He testified that, just a month prior to reaching the Global Settlement, Fibreboard had been willing to accept a $3.2 billion coverage settlement that would not have affected plaintiffs' tort claims at all, and that would have paid Fibreboard $150 million *less* than it was subsequently guaranteed under the Trilateral Agreement. JA 118a. Thus the restrictions on plaintiffs' tort claims in the Global Settlement are, by the sworn testimony of Fibreboard's own counsel, entirely gratuitous.

On July 27, 1995, the district court reaffirmed its "preliminary" certification of the class pursuant to Rule 23(b)(1)(B). The court held that Rule 23(a)'s requirements of commonality, typicality and adequacy of representation were met because "all class members share ... common interests [in] maximizing the total settlement [and in] adopting procedures that provide for payments to claimants in an equitable manner." CA 226a-227a. The district court predicated this certification ruling on *Georgine v. Amchem Products*, 157 F.R.D. 246 (E.D.Pa. 1994) (see CA 225a, 228a), and Herbert Newberg & Alba Conte, 2 NEWBERG ON CLASS ACTIONS § 11.28 (3d ed. 1992) (see CA 223a, 225a, 226a). Both of these authorities—and the rule for which the district court cited them—were subsequently repudiated by this Court in *Amchem*. *See* 117 S.Ct. at 2247, 2249-50 & n.18. The district court then approved the settlement. CA 521a.

A divided panel of the Fifth Circuit affirmed over the vehement dissent of Circuit Judge Jerry Smith. The majority expressly refused to follow the Third Circuit's decision in *Georgine v. Amchem Products,* 83 F.3d 610 (1996), subsequently affirmed by this Court in *Amchem Products v. Windsor*, 117 S.Ct. 2231 (1997). Instead, the majority held that a settlement reduces the need to measure a class against Rule 23's requirements (CA 55a-56a) and that the "questions of law or fact common to the class" under Rule 23(a)(2) may be "derived from the settlement rather than from the [plaintiffs'] complaint." CA 56a-57a. The panel further held that Rule 23(a)(3)'s requirement that the "claims or defenses of the representative parties" be "typical" of the class required no reference to the claims actually pleaded in the class complaint, but that "typical" interests, such as the class members' "interests in maximizing recovery for the class and eliminating the risk posed by the insurance coverage litigation" (CA 57a), could instead arise from the settlement itself.

The panel rejected Petitioners' arguments that the class failed Rule 23(a)(4)'s requirement of adequate representation because both the class and its counsel were riven by the internal and external conflicts described above. Without actually contesting the existence of these conflicts, the panel majority simply held these conflicts were "overwhelmed" by the common interest of all class members in obtaining a settlement. CA 67a-72a.

Despite the fact that the class complaint pleaded, and the settlement released, individual personal injury damages claims

against Fibreboard rather than equitable or "*in rem*" claims against a trust or a *res*, the Fifth Circuit upheld the certification of a mandatory class under Rule 23(b)(1)(B) because the possibility that Fibreboard might lose the insurance coverage litigation it had been winning for years, and therefore might someday become insolvent, created a "'risk' that separate adjudications 'as a practical matter' would 'substantially impair or impede' the interests of the class." CA 78a. The circuit court held that *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985), does not require that class members be afforded an opportunity to opt out of the class.

Petitioners argued that the Rules Enabling Act, 28 U.S.C. § 2072, and related principles of federalism, prohibit the federal judiciary from using Rule 23(b)(1)(B) to effect such a mandatory, *pro rata* abridgement of the class members' substantive state-law rights against a defendant that is not in bankruptcy or receivership. But the Fifth Circuit held that its novel use of Rule 23(b)(1)(B) created "a superior alternative to the Bankruptcy Code" (CA 78a) and that it was therefore empowered to "circumvent[]" "the terms and principles of the Bankruptcy Code." CA 78a.

Finally, the court of appeals brushed aside Petitioners' arguments that the district court lacked subject-matter jurisdiction to approve this collusive settlement of unaccrued, future damages claims (CA 86a-88a), and that adequate notice could never be given to legions of uninjured class members who may not even know of their exposure to asbestos, let alone be able intelligently to evaluate a proposed settlement so as to decide whether to object. The dissent deemed these defects insurmountable. CA 113a-116a; 154a-181a.

Judge Smith castigated the majority for "legislat[ing] a bold and novel tort reform proposal thinly disguised as the settlement of a lawsuit." CA 104a. Indeed,"there never was a lawsuit: Fibreboard and its hand-picked class counsel agreed to file a suit only if they had already settled it." CA 104a. This settlement "is purely legislative: Class members' causes of actions are repealed in favor of the equivalent of a workers' compensation regime." CA 105a.

6. The Fifth Circuit Decision After Remand. This Court vacated the Fifth Circuit's decision and remanded the case for reconsideration in light of *Amchem Products v. Windsor*, 117 S.Ct. 2231 (1997). CA 36a. Over a strenuous dissent (CA 3a-35a), the

same panel majority issued an unsigned opinion just five paragraphs long, reinstating its prior decision. CA 1a-2a.

SUMMARY OF ARGUMENT

I. In *Amchem*, this Court held that a similar settlement-only, nationwide, asbestos future-claimant class could not satisfy Rule 23(a)'s requirements. This Court expressly disapproved the Fifth Circuit's prior decision in this case. 117 S.Ct. at 2247, 2248 & n.16, 2249 & n.18. On remand, however, the court of appeals simply reinstated its prior Rule 23(a) rulings and insisted that *Amchem* was distinguishable because this case was certified under Rule 23(b)(1)(B), whereas *Amchem* involved a Rule 23(b)(3) class action. But the distinction among the Rule 23*(b)* categories makes no difference in the application of Rule 23*(a)*, which imposes four threshold requirements governing *all* class actions.

Amchem thus controls this case. Indeed, this case is *worse* than *Amchem*. Here, the Respondents have tried to manufacture common and typical legal questions not by reference to the asbestos personal injury claims pleaded in the complaint and released in the settlement, but by reference to issues raised in a *completely different lawsuit* — an insurance dispute between Fibreboard and its Insurers in California state court. Further, the settling parties have tried to justify this class action (which contains no subclasses) as a "limited fund," which necessarily exacerbates the conflict between present and future tort claimants that this Court held was fatal in *Amchem*.

II. In fact, this class action cannot be certified as a "limited fund" class under Rule 23(b)(1)(B). Any "fund" here is simply the contrived product of Fibreboard's unwillingness to contribute its own assets to the settlement, and the Insurers' desire to buy total peace with one limited lump-sum payment on Fibreboard's liability policies. Such self-interested machinations cannot create the predicate for mandatory class certification under Rule 23(b)(1)(B). Nor can the risk of future insolvency create a "limited fund," which is reserved for fixed assets in which claimants have pre-existing interests.

Using Rule 23(b)(1)(B) in this context would abridge class members' rights under state law and violate the Rules Enabling Act. It would also circumvent the bankruptcy laws enacted by Congress,

including a 1994 statute specifically designed for insolvent defendants overwhelmed by present and future asbestos liabilities.

III. This mandatory class action violates the Due Process Clause because it adjudicates individual claims for money damages while denying any opportunity to opt out. The absence of an opt-out also deprived the courts below of personal jurisdiction over many class members lacking any contacts with the forum state of Texas.

IV. The Fifth Circuit's judgment denies due process and violates Rule 23 for the additional reason that, as this Court recognized in *Amchem*, meaningful notice cannot be given to currently uninjured "future claimants." Many people do not even know that they are class members. Those who do nonetheless lack the ability to evaluate the proposed settlement and decide whether to object.

V. There is no justiciable Article III controversy in this case. "Exposure-only" class members do not even have any injury in fact. The plaintiffs' lawyers who were solicited by Fibreboard to file this class action against it never intended to litigate an adversarial lawsuit. The class complaint pleads sham causes of action that the plaintiffs' Class Counsel (and the courts below) admit were a pretext. Indeed, this "class action" is a feigned proceeding staged by Fibreboard and its Insurers. In short, this is a legislative joint venture, not a justiciable controversy.

ARGUMENT

I. THE JUDGMENT BELOW DEFIES *AMCHEM*'S HOLDINGS ON RULE 23(a) AND CANNOT MEET THE REQUIREMENTS OF THAT RULE.

A. Commonality and Typicality Under Rules 23(a)(2) & (3).

In *Amchem*, this Court described the Fifth Circuit's prior opinion in this very case as holding that a "settlement obviates or reduces the need to measure a proposed class against the enumerated Rule 23 requirements." 117 S.Ct. at 2247. That holding was in turn expressly repudiated by this Court: Rule 23(a)'s specifications "demand undiluted, even heightened, attention in the settlement context." 117 S.Ct. at 2248 & n. 16. Because both the district court and the court of appeals applied a now-rejected, watered-down

standard for class certification, all their findings and rulings on Rule 23(a)'s requirements are invalid. When the Fifth Circuit on remand simply reinstated its prior Rule 23(a) rulings and again deferred to the district court's tainted "conclusions" that Rule 23(a)'s requirements had been met (CA 2a), it was refusing to apply the law laid down by this Court.

In *Amchem* this Court further noted that the Fifth Circuit's prior opinion had held that, "'in the settlement class context,'" the issues that bind a class together under Rule 23(a) "'arise from the settlement itself.'" 117 S.Ct. at 2247 (quoting the Fifth Circuit at CA 56a, which was citing 2 NEWBERG ON CLASS ACTIONS §11.28, at 11-58). *See also* CA 56a-58a (same). That holding was likewise squarely rejected by this Court: the questions that must be "common" to and "typical" of the class under Rules 23(a)(2) & (3) are the "legal or factual questions that qualify each class member's case as a genuine controversy, questions that *preexist* any settlement." 117 S.Ct. at 2249 & n.18 (emphasis added).[10]

Despite this clear directive, the court below ignored the legal and factual questions pleaded in the complaint and instead purported to find Rule 23(a) commonality and typicality in the class members' supposed "common interest" in "seeking equitable distribution of

[10] The authority of class plaintiffs to represent and bind absent class members under Rule 23 is limited by the scope of the class complaint, which describes the typical claims held in common by the class. Class representatives can release only those claims pleaded in the complaint or arising from the very same factual predicate as those pleaded. *National Super Spuds v. New York Mercantile Exchange*, 660 F.2d 9, 18-19 & n. 7 (2d Cir. 1981) (Friendly, J.). *Matsushita Electric Industrial Co. v. Epstein*, 116 S.Ct. 873, 878-79, 883 (1996), is entirely consistent, because there both the state-law claims and the exclusively federal claims arose from the identical factual predicate involving the same transaction. Since the class plaintiffs here do not, by definition, currently possess actionable "future" claims for asbestos personal injury or wrongful death or lost consortium, they do not plead such claims and thus cannot release or settle them on behalf of the class. 7B Charles Alan Wright, Arthur R. Miller & Mary K. Kane, FEDERAL PRACTICE AND PROCEDURE §1797.1, at 46-47 (Supp. 1995).

compensation" under the settlement. CA 3a. The Fifth Circuit thus repeated the very error that *Amchem* had just condemned.[11]

Upon remand from this Court's GVR order, the Fifth Circuit held that it could "find nothing in the *Amchem* opinion that changes our prior decision," because "this class action proceeded under Rule 23(b)(1); *Amchem* was a Rule 23(b)(3) case." CA 2a. But the court of appeals never attempted to explain how that distinction among the categories listed in Rule 23*(b)* could possibly make a difference in the application of Rule 23*(a)*, which imposes "four *threshold* requirements applicable to *all* class actions." *Amchem*, 117 S.Ct. at 2245 (emphasis added). Neither the courts below nor the Respondents have ever offered a principled basis for applying a double standard for 23(a) class cohesion depending on whether the class is on a (b)(3) or a (b)(1)(B) track. The Rule itself precludes any such suggestion: 23(b) expressly provides that "[a]n action may be maintained as a class action *if the prerequisites of subdivision (a) are satisfied*."[12]

If anything, the Fifth Circuit's error is even greater than that of the district court in *Amchem*. Respondents tout the "legal and factual questions presented by the insurance disputes" between Fibreboard and the Insurers and insist that it was by "reference to *these* legal and factual disputes that the Fifth Circuit determined satisfaction of the 'commonality' and 'typicality' requirements of Rule 23(a)." Class BIO 9 (original emphasis); *see also* Ins.BIO 8-9; Fibre BIO 20, 26.

Interesting. But the legal and factual questions raised in the

[11] As Judge Smith explained, *Amchem* held that a common interest in a fair compromise is not enough. CA 19a-20a, 29a, 31a & n.31. The "benefit asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration, but it is not pertinent" to certification under Rule 23(a). *Amchem*, 117 S.Ct. at 2249.

[12] It could hardly be otherwise, since those prerequisites for class cohesion and identity of interest were "carefully drawn to meet constitutional requirements," 7B Charles Alan Wright, Arthur R. Miller, & Mary K. Kane, FEDERAL PRACTICE AND PROCEDURE § 1789, at 251 (1986 & 1995 supp.), and are essential for making any virtual representation of an absent class consistent with due process, regardless of which particular class mode is in issue. *Amchem*, 117 S.Ct. at 2248; *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982); *Hansberry v. Lee*, 311 U.S. 32, 43-45 (1940).

insurance coverage litigation are presented *not* in *this* case, but in two *other cases, both independent of this one*—the state court coverage litigation in California and the *Rudd* class action brought by the Insurers to lock in the Trilateral Agreement. *See* nn. 3, 6 *supra*. Respondents note that the plaintiff class's stake as potential beneficiaries of Fibreboard's liability insurance policies was "referred to in the complaint" in this case, Fibre BIO 20 (citing CA 556a-559a)—but those "references" were mere background, not the requisite "'claims or defenses that can be raised in courts of law as part of an actual or impending lawsuit.'" *Amchem*, 117 S.Ct. at 2249 n.18. The actual claims made in the complaint (CA 560a-564a) were *personal injury tort claims against Fibreboard*, not insurance coverage third-party beneficiary claims against the Insurers. Indeed, the *only* claims pleaded are garden variety asbestos personal injury, money-damages claims, including negligent failure to warn, strict liability, and breach of warranty, and they are asserted exclusively "against Fibreboard." CA 564a. Thus the legal issues that, according to the Respondents and the court below, supposedly furnish the requisite commonality and typicality under Rule 23(a) for this class certification involve *not* the claims alleged in this class action, *but the claims in another lawsuit altogether*.

To help Fibreboard win its coverage dispute, perhaps the class could have intervened in the insurance coverage case (on Fibreboard's side of the docket) in California state court, as Class Counsel now suggest. Class BIO 9. And, following any settlement of the coverage case, perhaps the plaintiff class (rather than the Insurers themselves, as actually happened) could have instituted its own *Rudd*-style class action seeking a declaration of the plaintiffs' rights under those policies and any settlement thereof. But Respondents' musings about what "could have" been, Class BIO 9, 28, are simply irrelevant to the certification of *this* class action, which pleads—*and releases*—personal injury tort claims against Fibreboard. A possible interest as contingent third-party beneficiaries in the settlement of an independent insurance coverage dispute being litigated in a state court in California cannot possibly fulfill the Rule 23(a) prerequisites for certification of a separate personal injury class action being litigated in a federal court in Texas.

In *Amchem,* the settling parties at least limited themselves to trying to bootstrap class certification on the basis of the settlement in their *own* action. But the courts below and the settling parties here have transcended the boundaries of space, time and logic in trying to certify a class based on the pleadings and issues addressed in a wholly separate lawsuit. If such remote and extrinsic matters are sufficient to meet the requirements of Rule 23, then that rule would appear to have no limits left at all.

The Fifth Circuit admitted that the "disparate questions undermining class cohesion" in *Amchem*, 117 S.Ct. at 2250 — variations in exposure, family situations, smoking histories, diseases, and state law—would likewise affect the recovery of class claimants here. CA 57a.[13] But the court held that this lack of cohesion was irrelevant because this settlement merely sets up an "equitable distribution process," whereas the settlement in *Amchem* supposedly "award[ed] damages to class members based on the severity of their injuries alone." CA 58a n. 8.

Not so. The *Amchem* settlement, just like this one, merely established an "administrative mechanism" under which claims could be paid; as this Court noted, it did not pre-ordain the amounts to be awarded. 117 S.Ct. at 2240. Claims were to be liquidated "based on all the factors" historically used "to evaluate claims for settlement," including all those individual questions of exposure, causation, and disease. *See Georgine v. Amchem Products*, 157 F.R.D. 246, 276-77 (E.D.Pa. 1994). Those are the very same factors and "individual circumstances" that the Fifth Circuit itself recognized are central to claims processing under the Global Settlement. CA 58a n. 7. Indeed, the circuit court agreed that, because of these differences, "a class action *requesting individual damages* for members of a global class of asbestos claimants would

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[13] Even exposure to asbestos creates no common question of law or fact under Rule 23(a)(2), because to prove class membership and a right to damages all claimants would have to present *individual* proof regarding the circumstances of their exposure to Fibreboard products. As in *Amchem*, class members here were exposed to differently labeled products, "for different amounts of time, in different ways, and over different periods." 117 S.Ct. at 2250. And, both because the composition of Fibreboard products and warning labels varied over the years, and because state laws impose varying standards for negligence and product defect, even Fibreboard's conduct raises no common issues.

not satisfy the typicality requirements." CA 58a n. 8 (emphasis added). *But that is this case*: the Complaint requests the award to each class member of the individual "compensatory damages . . . sustained by each of them respectively." CA 564a. Once one accepts *Amchem*'s holding that class cohesion does not turn on the issues in the settlement, it is clear (even to the court below) that this class flunks Rules 23(a)(2) & (3).

B. Adequacy of Representation Under Rule 23(a)(4).

This Court held in *Amchem* that Rule 23(a)(4)'s requirement of adequate representation cannot be met where a mass tort class is riven by a conflict between "currently injured" and "exposure-only" future plaintiffs. 117 S.Ct. at 2251. The goal of the largest possible immediate payouts for the former group "tugs against the interest of exposure-only plaintiffs in ensuring" ample settlement funds "for the future." *Id.* Here, as in *Amchem*, "named parties with diverse medical conditions" from asbestos exposure, represented by a single set of attorneys, "sought to act on behalf of a single giant class rather than on behalf of discrete subclasses." 117 S.Ct. at 2251.[14] If anything, as this Court itself observed in *Amchem*, the conflict between present and future tort claimants is exacerbated when the settlement class is treated, as it was here, as "a 'limited fund' case certified under Rule 23(b)(1)(B)." 117 S.Ct. at 2251. *See also Walker v. Liggett Group*, 175 F.R.D. 226, 231 n. 8 (S.D.W.Va. 1997)("the alleged limited fund exacerbates the apparent conflicts creating what has been described as a zero-sum game")(citing *Amchem*).

Regardless of the size of the settlement fund, the conflict between future claimants and the currently injured is manifested here, as it was in *Amchem*, in the settlement's "essential allocation decisions designed to confine compensation and to limit defendant's

[14] This Court quoted *In re Joint E. & S. Dist. Asbestos Litigation*, 982 F.2d 721, 742-43 (2d Cir. 1992). 117 S.Ct. at 2251. On rehearing, the Second Circuit decided that subclasses were not necessary because, in bargaining for the bankruptcy plan in that case, the parties did not intend to create "legally enforceable rights" to a "first in, first out" payment priority. *In re Findley*, 993 F.2d 7, 9-11 (2d Cir. 1993). That determination is irrelevant here, where the class members' rights to immediate, unrestricted recovery of their tort judgments are established not by a negotiated plan but by state law. See Part II, *infra*.

liability." 117 S.Ct. at 2251. Damages payments from the trust are capped at $500,000 per claimant; pre- and post-judgment interest are forbidden (as are punitive awards); payments are spread out over at least three years (up to ten years for claimants who insist on a trial); and there are other "spendthrift provisions"—all designed to "limit the amount of the trust assets that can be paid out in any given year . . . so that they will be available to compensate injured class members whose claims develop far in the future." CA 49a; 212a.

The Fifth Circuit did not deny the existence of this conflict in its original opinion (CA 67a-72a) or upon remand. CA 3a. Instead, the court simply characterized this conflict between present and future plaintiffs as "competition for earlier and larger shares of available money," and then held that this intra-class conflict—far from being a problem—is "precisely the reason" for a Rule 23(b)(1)(B) class, where such "conflict" can be "controlled for the benefit of all members of the class" by the district court. CA 3a. The very conflict which this Court held to be fatal in *Amchem* was deemed by the Fifth Circuit to be "outweighed" (CA 69a) by each class member's "common interest" in securing a settlement that equitably distributed Fibreboard's insurance fund. CA 3a.

Review of the *fairness* of a settlement's trade-offs is certainly the court's responsibility under Rule 23(e), but the *representation* required by 23(a)(4) is to be provided by unconflicted representatives with separate counsel. Contrary to the *ex post facto*, managerial approach embraced by the courts below for assuring adequate representation, Rule 23(a)(4) mandates *"structural assurance"* of fair representation for "diverse groups and individuals." 117 S.Ct. at 2251 (emphasis added). The "class certification inquiry does not examine the merits of the trade-offs created by a settlement, *but examines whether class representatives and class counsel had authority to trade at all.*" CA 19a (Smith, J., dissenting) (emphasis added).[15]

[15] The settlement proponents were unable to hide behind the district court's "findings" on the subject of class conflicts in *Amchem*, and that ploy should be no more successful here. Whether a set of circumstances amounts to a conflict of interest is a legal question subject to de novo review. CA 141a. Moreover, the clearly erroneous standard of review never applies where findings of fact are made under an erroneous view of controlling legal principles. *Kelley v. So.*

The conflict within this class is further confirmed by Respondents themselves, who concede that the Global Settlement limits and allocates recovery for asbestos injuries in order to "ensure the availability of funds to pay . . . the later-filed claims of exposure-only class members." Class BIO 14; Ins.BIO 13. Respondents defend these restrictions as necessary because the settlement fund "is not large enough to guarantee full payment over a period of many years for all the claims that class members might potentially assert against it." Class BIO 13. The preferences enforced, and the sacrifices imposed on different groups, by Class Counsel acting in their Olympian role as arbiters of the interests of all class members, are put in stark relief by Respondents' observation that, without the various caps and spendthrift restrictions, the settlement would give currently injured class members "unlimited access to the insurance fund for their claims and the devil take the hindmost as to the rest of the class." Fibre BIO 22.[16] But this assertion, like Respondents' frequent cries that the Global Settlement is fair "from the standpoint of the class as a whole," Fibre BIO 22, and that its benefits for the class "'overwhelmed'" and "'outweighed'" the "'divergent'" interests within the class, simply repeat the error of the court below. Ins. BIO 17, 13; Class BIO 11-13. The settlement's fairness is the standard for approving it under Rule 23(e), *not* for addressing conflicts within the class under Rule 23(a)(4). This categorical distinction "serve[s] to inhibit appraisals of the chancellor's foot kind — class certifications dependent upon the court's gestalt judgment

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Pacific Co., 419 U.S. 318, 323 (1974). Here the district court held that "the fairness of the Global Settlement establishes a rebuttable presumption that Class Counsel adequately represented the class." CA 502a. That holding confuses 23(e) with 23(a) and was repudiated by *Amchem*. *See* 117 S.Ct. at 2248.

[16] Class Counsel ultimately retreat to the position that any conflict within the class does not require decertifying the class and voiding the settlement, but at most requires remanding for the creation of subclasses to renegotiate the details of the settlement trust. Class BIO 14. But if such an attempt to unscramble the class action omelette were an adequate remedy, that step would have been ordered by the Third Circuit and this Court in *Amchem*, where the very same intra-class conflict voided the class certification. Conflicts under 23(a)(4) taint the class certification *ab initio*, and the only proper course is to decertify the class and leave the parties to start over, if they wish.

or overarching impression of the settlement's fairness." *Amchem*, 117 S. Ct. at 2248.

There is also a disabling conflict between those class members first exposed to asbestos before 1959 (when Fibreboard had unlimited coverage under its policies with the Insurers) and those exposed after 1959 (for whom there was no remaining insurance and recovery could be had only against Fibreboard's own assets). It is undisputed that, prior to the settlement, the claims of pre-1959 victims were, as one would expect, enormously more valuable than those of the post-1959 victims. CA 148a-150a & n.49. Yet, without separate representation for these groups, the settlement sacrificed the fortunate status of pre-1959 claimants to benefit the class as a whole, *id.*, thus "forc[ing] the pre-1959 claimants to give up something of value that is legally their due—their cause of action against an insured Fibreboard—in order to benefit a group of claimants to whom they owe nothing." CA 25a (Smith, J., dissenting).[17]

In addition to the conflicts that divided this class internally, Class Counsel's representation was inadequate here because of their conflicting duties to their thousands of individual clients *outside* of the class. *Cf. Amchem*, 117 S.Ct. at 2239. As Respondents' own ethics expert witness admitted, the present clients of class counsel were in fact competing with future claimants for whatever settlement dollars Fibreboard and its Insurers were willing to pay, since there was some "reserve price" which the Insurers were unwilling to exceed in settlement of all claims. JA 366a. *See also* JA 281a-82a, 299a-303a; *Amchem*, 117 S. Ct. at 2251 (noting conflicts with

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[17] Respondents assert that this conflict was eliminated before the Global Settlement was negotiated by the April 9, 1993 agreement in which Fibreboard and Continental supposedly agreed to ignore the distinction between pre- and post-1959 claimants. Class BIO 17 n.8. But this is belied by the separate Ness, Motley inventory settlement which likewise discriminates between these groups, even though it too was reached after the April 9 agreement. That settlement shows that the Respondents themselves, like the tort system, continued to assess a pre-1959 claim at three times the value of a post-1959 claim. JA 80a; CA 149a & n.49 (Smith, J., dissenting). The pre-1959 group therefore had a great deal to lose in a Global Settlement that supposedly treated all claimants alike.

respect to allocation of settlement resources in "limited fund" setting).[18]

Class Counsel's conflicting duties manifested themselves in the form of "inventory" settlements for their individual clients that provided for payments contingent upon approval of a class settlement in this case — while Class Counsel gerrymandered the class definition to ensure that their own individual clients were not encompassed within the class. Once those inventory side deals were reached, Class Counsel owed it to their individual clients to reach *any* class settlement, on *any* terms that could survive the court approval process, and that necessarily hampered Class Counsel in seeking the best possible settlement for the class. CA 142a-143a.[19] Indeed, at least 45,000 of Class Counsel's individual clients were, by Counsel's own admission, "opted out" of the Global Settlement and were provided separate deals in the inventory settlements, even if they had no lawsuit filed against Fibreboard when the class action was instituted. *See* JA 119a. *See also Amicus Curiae* Brief of Law Professors (discussing gerrymandering of the class definition). This demonstrates that Class Counsel had far greater faith in the value of their side deals than they did in the value of the Global Settlement that they have imposed on hundreds of thousands of unknowing future tort victims.

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[18] *See also In re Bendectin Prod. Liab. Litig.*, 749 F.2d 300, 304 (6th Cir. 1984) (finding class counsel inadequate to represent both "present" claimants, who had already filed lawsuits, as well as potential future claimants); *Kuper v. Quantum Chem. Corp.*, 145 F.R.D. 80, 83 (S.D. Ohio 1992) (finding inadequate representation due to concurrent representation of potentially competing claimants outside the class); *Jackshaw Pontiac v. Cleveland Press Publishing Co.*, 102 F.R.D. 183, 192-93 (N.D. Ohio 1984) (same).

[19] Full payment of the inventory side deals would also occur in the event of a final victory for Fibreboard in its coverage lawsuit against the Insurers, but of course Class Counsel had no way to control that contest, whereas acceptance of a Global Settlement was entirely within their grasp.

II. THE RULES ENABLING ACT, RULES OF DECISION ACT, RULE 23 AND PRINCIPLES OF FEDERALISM ALL PROHIBIT MANDATORY CLASS TREATMENT OF THE INDIVIDUAL, *IN PERSONAM* CLAIMS FOR DAMAGES ALLEGED IN THIS CASE.

A. This Case Is Not Cognizable As A Limited Fund Class Action Under Rule 23(b)(1)(B).

Although this class cannot satisfy the requirements of Rule 23(a) as set forth in *Amchem*, the certification of this mandatory class under Rule 23(b)(1)(B) raises even more disturbing problems of manipulation of the federal rules—problems that were not presented in *Amchem*. Rule 23(b)(1)(B) provides that a case may be maintained as a class action if "the prosecution of separate actions by or against individual members of the class would create a risk of adjudications" that would "as a practical matter be dispositive of the interests of other members ... or substantially impair or impede their ability to protect their interests." The Fifth Circuit held that this standard was met on the ground that "Fibreboard is a limited fund." CA 73a.[20] This holding was error. Indeed, the shifting explanation

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[20] Although Rule 23(b)(1)(B) does not use the actual words "limited fund," it is undisputed that the rule "necessarily contemplates the allocation of a limited resource," because "only where the class members' interests are to some degree mutually exclusive will the individuals' litigation 'substantially impair' the others' rights." CA 8a n.7 (Smith, J., dissenting). "Thus, where the remedy sought is money damages, the paradigm is of a 'limited fund' to be distributed for the class members' benefit." *Id.* The Fifth Circuit majority agreed, repeatedly noting that whether this class can be certified turns on whether Fibreboard properly constitutes "a limited fund appropriate for adjudication under Rule 23(b)(1)(B)." CA 74a; *see id.* at 73a, 75a, 77a. The district court, in a holding not embraced by the Fifth Circuit, held in the alternative that a "class may be certified under Rule 23(b)(1)(B) irrespective of whether a 'limited fund' may be said to exist." CA 491a. But the cases cited by the district court involved injunctive or similar class-wide relief, not exclusively claims for damages. *See White v. Nat'l Football League*, 822 F.Supp. 1389, 1409, 1411 (D.Minn. 1993) (class sought injunction dealing with contract rules affecting all players), *aff'd on other grounds*, 41 F.3d 402 (8th Cir. 1994); *Specialty Cabinets v. American Equitable*, 140 F.R.D. 474, 477-78 (S.D.Ga. 1991)(class sought to enforce commonly held fiduciary duties under ERISA plan that by law could

by Respondents and the courts below as to precisely *what* constitutes the "limited fund" here underscores that Rule 23(b)(1)(B) cannot be satisfied in this case as a matter of law.[21] No selection from the smorgasbord of justifications offered in support of a (b)(1)(B) class here can survive scrutiny.

Initially, the Fifth Circuit defined the limited fund as "the present value of Fibreboard's *non-insurance* assets." CA 73a (emphasis added). But the exclusion of insurance assets is wholly arbitrary — especially because, at the time the settlement was negotiated and approved, the California court had repeatedly ruled in Fibreboard's favor in the coverage dispute. *See* page 2, *supra*. To say that, *apart* from the insurance assets, Fibreboard's funds are limited is to miss the big issue—rather akin to asking, "Apart from *that*, Mrs. Lincoln, how did you like the play?"

As a hedge against the transparent ruse of excluding Fibreboard's insurance, the courts below held "[a]lternatively" that "the 'limited fund' may be viewed as the sum of the value of Fibreboard plus the value of its insurance coverage." CA 492a; CA 73a. This "fund" is a mixture of the unreal and the surreal: unreal, because Fibreboard's assets were never on the negotiating table and Fibreboard contributed virtually nothing to the Global Settlement, given its adamant position that insurance pay for all its asbestos liabilities; surreal, in that the courts below limited the value of Fibreboard's insurance policies to the amount Fibreboard and its Insurers agreed upon in the Trilateral Agreement, even though those policies had no aggregate liability cap and the Insurers thus faced, as the circuit court conceded, "virtually unlimited liability for damage[s]." CA 75a.

As a third alternative, the district court held that "the disputed insurance asset liquidated by the $1.535 billion Global Settlement may be viewed as a limited fund." CA 491a. In essence, the courts

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inure to benefit only of class as a whole).

[21] During opening arguments, Judge Parker inquired as to Respondents' theory of a limited fund. Class Counsel replied, "Each one of the participants at these counsel tables have [*sic*] a different view of how one might approach Rule 23," which prompted the court to observe, "You dodged that question very well, counsel." JA 31a-33a.

below held that, even though Fibreboard was insured without limit by two robust liability carriers, the mere existence *ex ante* of a risk that Fibreboard might lose on appeal in the insurance coverage litigation (which, of course, Fibreboard did not), was enough to permit the parties to negotiate a "limited" fund justifying certification of a mandatory class.[22] But if that were true, a federal court could force all potential plaintiffs, including exposure-only claimants whose causes of action had not yet accrued, to give up their rights under state law and to share, through an ADR scheme imposed on them by persons with interests different from theirs, in a fund that — unlike the unlimited insurance pool that otherwise would have been available but for the deal struck by the settling parties — is limited only by the economic self-interest of Fibreboard and its Insurers. That is not — and cannot be — the law.

Fourth and finally, the courts below offered a pseudo-bankruptcy rationale for certification under (b)(1)(B), based on Fibreboard's potential for insolvency if (contrary to what ultimately happened) it had lost the insurance coverage litigation. CA 74a. But, as we will explain in detail below, Rule 23(b)(1)(B) was not promulgated as a substitute for bankruptcy or receivership, and application of the Rule in this context violates the Rules Enabling Act and the Rules of Decision Act.

1. The "limited fund" in this case was contrived.

Whatever its guise, the supposed "limited fund" on which the courts below predicated mandatory class certification was not a fact of life foisted upon the parties by past events. Nor was it the result of circumstances beyond the control of Fibreboard and its Insurers. Rather, in the candid words of the district court, the limited fund at issue here is a "*prospective* fund that's been *negotiated*." JA 31a (emphasis added). But such self-interested intrigues by parties (and

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[22] The district court relied on *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989), for the proposition that a (b)(1)(B) limited fund can be created by the settlement of an insurance dispute. CA 491a. But that class action was ultimately certified under Rule 23(b)(1)*(A)* not (b)(1)(B), *id.* at 742, and the insurance policies at issue there, unlike those held by Fibreboard, capped aggregate liability coverage at a stated amount. Id. at 741.

Class Counsel purporting to represent millions of absent parties) cannot create the predicate for mandatory class certification under Rule 23(b)(1)(B).

Fibreboard's "corporate goal" was to "resolve its asbestos liabilities" wholly through its "insurance resources," without using a dime of its own equity to fund a settlement. CA 577a; JA 104a. The Insurers—who had consistently lost to Fibreboard on all issues in the coverage litigation in the trial court in California—were on the hook for unlimited liability because the policies they had issued to Fibreboard *had no aggregate limit*. Hence the Insurers had to admit under oath that there was no "capped amount of money" in this case. JA 281a. The "insurance companies' resources . . . were for practical purposes *without limit*"; there was "*no artificial limit* on the amount that the insurance companies could pay to settle this case." JA 368a (emphasis added). Thus, the *only* limit on the funds available to resolve future asbestos claims was "that there was obviously some overall cost to the insurers that they ultimately would conclude they weren't prepared to exceed" in their settlement negotiations. JA 281a-82a. But every settlement, every fund, is "limited" in that obvious sense. In the Insurers' words, the "proposed settlement would thus operate to create for the first time the very 'limited' fund that would then be subject to equitable allocation under Rule 23(b)(1)(B)." JA 527a. The district court accordingly ruled that the "Global Settlement created the fund." CA 518a.

Respondents admitted at the fairness hearing that "of course" the Insurers "could . . . have settled with the plaintiffs on a (b)(3) opt-out class." JA 114a. But the prospect of someday having to pay tort judgments to opt-outs not covered by the settlement would have spoiled the Insurers' hope of "total peace," so the Insurers were "adamant that any global agreement here would have to be done on a non-opt-out basis." JA 37a, 36a. *See also* CA 43a.

Class Counsel initially opposed the Insurers' demand for a (b)(1)(B) class, arguing that it would be "not only legally deficient, but unworkable practically" (JA 571a) because there was no limited fund here. JA 559a. Fibreboard was "not willing to put all of its assets before the court to divide among the asbestos plaintiffs." *Id.* Hence a mandatory class would violate "the definition of a limited fund proceeding," by "forc[ing]" class members to "settle their

claims against a fund that contains less than all of the assets that should be available to pay those claims." JA 560a. Class Counsel also pointed out that the insurance policies could not be considered a limited fund, because the Insurers' "liability to Fibreboard" was not "limited to some finite amount of insurance money or other *res* that will be insufficient" to resolve all claims. JA 559a.

Class Counsel testified under oath that they changed their minds and accepted a mandatory (b)(1)(B) class when Continental "came to the table and brought its checkbook." JA 114a. And the Insurers confirmed that their insistence on a (b)(1)(B) as opposed to a (b)(3) class action greatly increased the cost of the settlement:

> Continental's insistence on a no-opt-out transaction cost Continental in the price negotiations. Continental was compelled to pay more money as the price of a global settlement in order to secure total peace. And Continental as a corporate matter made the decision that it was prepared to pay more ... in order to put it to bed once and for all, no opt-outs. ... We paid for it.

JA 37a. Thus, the "fund" that the courts below deemed "limited" in fact *got bigger* when the Insurers demanded the move from a (b)(3) opt-out class to a mandatory (b)(1)(B) class. *The type of class action acceptable to the Insurers—i.e., a mandatory class— dictated the size of the so-called limited fund.* In the words of Rule 23(b)(1)(B), the ability of class members here to protect their interest in full recovery for their asbestos injuries is not "impair[ed] or imped[ed]" by a limited fund — it is impaired by the Respondents' foisting upon the class members a non-opt-out class action that limits all future claimants to recovery from a fund whose limits have been imposed by the Respondents.

This turns Rule 23 on its head. The parties' preference for a mandatory class surely cannot justify the imposition of a limited fund. Rather, it is the pre-existence of an insufficient fund, created by legal or factual circumstances beyond the parties' control, that is supposed to justify the employment of a mandatory class. The judgment below sanctions a regime in which "limited" funds can be contrived by defendants and class counsel, with the opt-out rights guaranteed by Rule 23(b)(3) being bargained away on the basis of

the corporate policies of defendants and insurers and the monetary demands of Class Counsel.

This settlement fund is therefore "limited" only in the sense that literally every settlement is limited: there is always an upper limit to what any defendant and its insurers are willing to pay. If that phantom limitation, imposed solely by the defendant's bargaining posture, suffices to justify application of Rule 23(b)(1)(B), as the court below held it does, then *every* settlement of class claims for money damages would be eligible for treatment not only under Rule 23(b)(3) but also under the more lenient and less protective Rule 23(b)(1)(B), which lacks both a predominance requirement and an opt-out right. In that event, the (b)(3) safeguards that this Court upheld in *Amchem* would be for naught.

2. The risk of future insolvency cannot create the "limited fund" required by Rule 23(b)(1)(B).

The Fifth Circuit also equated a "limited fund" with a risk of future insolvency (based on a forecast of potential future tort claims and a prediction of a loss in a separate lawsuit involving insurance coverage) (CA 74a), notwithstanding the court's own finding that, "in spite of the threat posed by future personal injury litigation, Fibreboard is currently solvent and healthy." CA 78a. Yet it is hornbook law that a Rule 23(b)(1)(B) limited fund is "a *fixed asset* or piece of property . . . in which all class members have a *pre-existing* interest."1 NEWBERG ON CLASS ACTIONS §4.09 at 4-32-33 (emphasis added). Classic illustrations include competing claimants to a trust, company assets in a liquidation sale, or a vessel involved in a maritime accident suit. *Id.* The potential for future "monetary insolvency of a defendant does not create a classic instance of a limited fund." 3 NEWBERG ON CLASS ACTIONS §17.15A at 3S-16 (3d ed. Supp. 1994). "In the event an entity is insolvent, bankruptcy law is normally the source of protection to assure a fair and orderly distribution of assets insufficient to meet claims." 3 NEWBERG ON CLASS ACTIONS §17.15A (3d ed. Supp. 1995).[23]

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[23] Respondents' citations to 18th and 19th century cases concerning mandatory class suits that were the precursors to suits under Rule 23(b)(1)(B) in fact support our point. Ins.BIO 22-23. All of those cases involved claims of commonly held rights or separable rights asserted against a common fund or specific property. It is undisputed that the claims pleaded and released here are very different. Respondents cite Prof. Chaffee's discussions of suits at law involving rights held in common to a pre-existing *res* (e.g., a bank in receivership, a "bankruptcy," or "a communal mill"). Z. Chaffee, SOME PROBLEMS OF EQUITY 151, 159, 285 (1950). But Prof. Chaffee acknowledged that mandatory class suits—those which could resolve class members' claims and bind them in their absence—were historically limited to the *in rem* context, where "all the members are connected similarly with land or money within the jurisdiction." *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297, 1308 (1932); *see also Christopher v. Brusselback*, 302 U.S. 500, 504 (1938)(limiting scope of binding effect of class actions to cases "affecting [class members'] interest in property within the jurisdiction of the court"). "On the other hand, if the unjoined persons have special claims or liabilities, their rights are personal and cannot be concluded in their absence." *Id.* *See also* Robert Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U.L.Rev. 213, 282 (1990)(if the claims of class members "had a direct effect on the personal rights or duties of individual class members by, for example, adjudicating ... tort liability," then the action was "spurious" and did not bind non-participating class members). *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 298, 311-12 (1853), involved the division of shares of existing property held in common by the members of a religious association. All of the old English cases cited by Respondents likewise involved claims held in common to a pre-existing *res* (and usually by people with a pre-existing jural relationship), such as rights by a ship's crew under a ship's articles to a privateering prize, rights under a previous decree to tithes from parishioners, rights to shares of property under a partnership agreement, or the application of a tax to an annuity arising from a commonly held trust estate.

In breaking with this traditional understanding of Rule 23(b)(1)(B), the Fifth Circuit based its "insolvency" analysis on the Advisory Committee Note to the 1966 Amendment to Rule 23, and held that "a limited-fund class action is appropriate in actions by creditors 'when the debtor's assets are insufficient to pay all creditors' claims.'" CA 77a (quoting the Note). But the rest of the sentence in the Note, which the court below did not quote, reveals that the Advisory Committee was not advocating the use of 23(b)(1)(B) any time a defendant anticipates a risk of future insolvency, but approving use of that Rule only in "an action by a creditor to set aside a fraudulent conveyance by the debtor and to appropriate the property to his claim, when the debtors' assets are insufficient to pay all creditors' claims." Advisory Committee Notes on 1966 Amendments to Rules of Civil Procedure, 39 F.R.D. 69, 101

(1966) ("Adv.Comm. Note"). In such a case the action would involve recovery of a particular, fraudulently conveyed asset (hence, a limited fund) and would lie against the recipient of the asset, not the insolvent debtor.[24]

The Advisory Committee Note also states that a (b)(1)(B) class is appropriate "when claims are made by numerous persons against a fund insufficient to satisfy all claims." 39 F.R.D. at 101. This is the classic statement of the "limited fund" construction of the Rule, but the Advisory Committee's citation of *Dickinson v. Burnham*, 197 F.2d 973 (2d Cir. 1952), *cert. denied*, 344 U.S. 875 (1952), demonstrates that the Committee was not, as the Fifth Circuit would have it, sanctioning the use of (b)(1)(B) as a general bankruptcy substitute whenever the defendant offers a forecast of its future insolvency. The defendant in *Dickinson* was not an insolvent debtor, but was instead the holder of the funds fraudulently conveyed by the debtor: those limited funds were treated as a constructive trust and the claims against that trust were—pursuant to applicable substantive law—subject to *pro rata* reduction.[25] Thus nothing in the Advisory Committee Note or in the cases it invokes even remotely suggests that Rule 23(b)(1)(B) may be used as an alternative to bankruptcy to

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[24] This is confirmed by the case cited by the Advisory Committee on this point, *Heffernan v. Bennett & Armour*, 243 P.2d 846 (1952), which approved a class action brought by a creditor to recover a fraudulent conveyance where the "fraudulently transferred property" was fixed, identifiable, and in "the custody of the court." *Id.* at 862. The *Heffernan* court likened the case before it to a representative suit brought "for an accounting on a trust fund," or on behalf of the "beneficiaries of a voting trust agreement," or to "impress a trust upon certain property in behalf of ascertainable beneficiaries," or to settle questions "common to all of the subscribers of a reciprocal or interinsurance exchange." *Id.* at 863. But here there is no such pre-existing, fixed, identifiable common property or fund. The "limited fund" in this case was contrived.

[25] The class representatives brought equitable claims seeking the imposition of a constructive trust on those funds, and then a *pro rata* distribution. *Dickinson*, 197 F.2d at 979-80. The court "limited recovery to the funds" held in constructive trust because the claims of the complaining parties were understood to be *in rem;* indeed, the court noted that nobody claimed the class "should have recovery from [the debtor] as on an ordinary tort liability for conspiracy and defrauding." *Id.* at 980.

collectively resolve *in personam* tort claims asserted against the insolvent debtor itself.[26]

As the Reporter for the Advisory Committee that wrote Rule 23(b)(1)(B) observed 30 years ago, "it would strain interpretation to say that particular actions by injured parties in a mass tort will 'impair or impede the ability of the other members to protect their interests;' th[is] clause is redolent of claims against a fund."[27]

B. The Abridgement of Class Members' Rights Under State Tort Law Violates the Rules Enabling Act.

In *Amchem*, this Court repeatedly stressed that Rule 23's requirements "must be interpreted in keeping with . . . the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.' 28 U.S.C. § 2072(b)." 117 S.Ct. at 2244. *See id.* at 2248, 2252. The Fifth Circuit ignored this command.

This is a diversity action. Pursuant to the Rules of Decision Act, the substantive rights of class members are therefore defined by "[t]he laws of the several states." 28 U.S.C. §1652. The class complaint pleads claims under state law for personal injuries from asbestos. CA 560a-63a. The prayer for relief seeks the award to

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[26] The Note's subsequent observation that "[s]imilar problems, however, can arise in the absence of a fund either present or potential," refers to cases in which the problem is not a limited resource to which many lay claim, but, for example, an "injunction secured by one of a numerous class" that "disable[s] the opposing party from performing claimed duties toward the other members of the class." 39 F.R.D. at 101-102.

[27] Letter of Benjamin Kaplan, at 2 (Feb. 7, 1963), Congressional Information Service Records of the U.S. Judicial Conference, Committees on Rules of Practice and Procedure 1935-1988, No. CI-6312-32. An eminent contemporary observer has concluded that "[t]he original concept of the limited fund class does not readily fit the situation where a large volume of claims might eventually result in judgments that in the aggregate could exceed the assets available to satisfy them, much less where the claimants may have a right to individual jury trials . . . . [T]he use of subdivision (1)(B) might be seen as an end run around the bankruptcy law, giving the defendant some of the benefits of bankruptcy without its burdens." William Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L.REV. 837, 840 (1995).

class members of the individual "compensatory damages . . . sustained by each of them respectively," as well as "punitive damages." CA 564a. The Fifth Circuit conceded that the substantive rights at issue here are plaintiff class members' state-law "damages" claims for "personal injuries." CA 58a, 76a. The district court similarly conceded that the class claims pleaded here are "*in personam* in character." CA 518a.

It is likewise undisputed that "an injured party has an *in personam* claim against the person responsible for his injury," that such a claim is "not limited by the amount of insurance carried by a defendant, nor by its liquid assets or net worth," and that a "final judgment against the defendant becomes much like any other debt, able to be collected from any of a defaulting debtor's existing or after acquired assets." CA 10a (Smith, J., dissenting).[28] Thus, if a class member individually prosecuted her personal injury claim against Fibreboard and secured a judgment, state law would provide that the judgment—whatever compensatory and punitive damages and interest were awarded—would be immediately enforceable against the company *in full*, and no other class member could interfere with collection of that judgment unless and until Fibreboard declared bankruptcy or was subjected to a receivership. "The contest of multiple plaintiffs for the limited assets of a common defendant is one which the common law has generally solved in terms of chronological priority." *David v. Bauman*, 196 N.Y.S.2d 746, 748 (N.Y.Sup.Ct. 1960).[29]

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[28] It is common ground that the "first and most obvious consequence of a judgment" is that it immediately "confers upon the successful party the right to issue execution or other process of the court for its enforcement." *Clarke v. Brown*, 244 A.2d 514, 518 (N.J. Super. 1968).

[29] "Phrases such as 'race of diligence' and 'first in time, first in right' are thus common in commercial matters. . . . Unless some legislative policy otherwise requires, there is no reason to treat the contest of multiple tort plaintiffs differently; while their claims originate differently, the ultimate goal of each is to be classed as a creditor in order to proceed against the assets of the defendant." *David v. Bauman*, 196 N.Y.S.2d at 748. *See also Duprey v. Security Mut.Cas.Co.*, 256 N.Y.S.2d 987, 989 (N.Y.App.Div. 1965)(the change from common law rule of first come, first served to *pro rata* distribution is "solely within the prerogative of the legislature"); CORPUS JURIS SECUNDUM §1697 Multiple Claims; Priorities and Settlements (1993)("first in time, first in right").

Ignoring the priority established by state law, the Fifth Circuit forthrightly admitted that the very purpose of the mandatory class certification here was "to effect a *pro rata* reduction of all claims." CA 82a. When the district court conceded that the class members' "'claims were, *prior to settlement*, *in personam* in character,'" it was implying that, in its view, "the settlement transformed the claims into something *other* than *in personam* claims." CA 156a n.56 (Smith, J., dissenting)(quoting the district court at CA 518a) (emphasis added). Respondents likewise concede that the whole point of the class certification here was to abridge state-law rights "by limiting class members' rights to obtain immediate and full payment of their individual state-law claims." Class BIO 20.[30]

This application of Rule 23(b)(1)(B) violates the Rules Enabling Act and the Rules of Decision Act. The court below "now takes away state-law rights of those who have been damaged in tort and allows the asbestos victims only a *pro rata* share in an artificially limited settlement fund." CA 13a (Smith, J., dissenting). And, by utilizing a procedural rule—Rule 23(b)(1)(B)'s mandatory class—to abridge and modify the substantive rights enjoyed by class members under their respective states' laws, the courts below have ignored the constitutional principles of separation of powers and federalism that undergird those statutes and are essential to the integrity of the federal judicial system. Rule 23(b)(3) provides a mechanism for aggregating individual, *in personam* claims for money damages if the stringent requirements of the rule are met. *See Amchem*. But because the possibility of mass opt-outs from the class under (b)(3) would have spoiled the Insurers' and Fibreboard's attempts to rid themselves of all future asbestos liability (CA 43a-48a), the Respondents and the courts below tried to shoehorn these damages claims into a Rule 23(b)(1)(B) class.

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[30] While the theory underlying the mandatory class certification here presupposes a *pro rata* reduction of class members' claims even in the *absence* of any settlement, the settlement itself imposes additional substantive limits on state-law rights. See *supra* page 8. Given that the Respondents never intended to litigate this class action (nor can anyone imagine how such "litigation" could have proceeded), these abridgements of substantive rights are effectively accomplished by the class certification itself.

As explained above, the fiction invoked by the circuit court was that this case is actually "an action *in rem*" (CA 84a) because of the risk of Fibreboard's future insolvency (CA 74a), supposedly allowing *pro rata* reduction of the class members' claims. But calling it that does not make it so. When genuine *in rem* claims are at issue — against a receivership, a vessel, a trust fund — the underlying substantive rights of plaintiffs are by their nature *already* limited by any competing claims against the same limited *res*. Therefore the Fifth Circuit's attempt to wedge its holding under the authority of other cases involving mandatory classes (CA 74a, 84a) is unavailing because those were *bankruptcy* cases where the underlying rights of the class members *were already limited* to a *pro rata* distribution of a *res* created by bankruptcy proceedings *before the class actions were initiated*. Everyone agrees that, under the Bankruptcy Code, a court "ha[s] authority to make changes in the state-law rights of creditors and to replace those rights with a new set of state-law rights." *In re Joint E. & S. Dist. Asbestos Litig. (Findley II)*, 982 F.2d 721, 734 (2d Cir. 1992).[31]

To be sure, even *in personam* claims such as the class members' state-law tort claims against Fibreboard can, in special circumstances not present here, be reduced, consistent with due process and federalism, to *in rem* claims to a *pro rata* share of a limited fund — in a traditional equity receivership. If "'it appears there will be a deficiency of assets, so that all the creditors cannot be paid in full, . . . the court will make a decree for the general administration of the estate,'" and order a distribution of assets "'agreeable to equity.'"

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[31] *See Findley II*, 982 F.2d at 735 (Rule 23(b)(1)(B) proper where court was exercising "*in rem*" jurisdiction over a pre-existing "trust" established pursuant to order of a prior bankruptcy reorganization and class members were seeking equitable distribution, pursuant to New York state trust law, of that trust); *In re Joint E. & S. Dist. Asbestos Litig. (Findley III)*, 78 F.3d 764, 777-78 (2d Cir. 1996) ((b)(1)(B) proper because case "is not an action for money damages but is rather an action in equity for the restructuring of the Trust" already established pursuant to the statutory authority of a bankruptcy court); *In re Drexel Burnham Lambert Group*, 960 F.2d 285, 288-92 (2d Cir. 1992) ((b)(1)(B) appropriate in connection with bankruptcy reorganization of Drexel's "estate"), *cert. dismissed*, 113 S.Ct. 1070 (1993); *see also Findley II*, 982 F.2d at 738 (noting that *Drexel* involved a "traditional limited fund" in which the class settlement was regarded by the court of appeals as a prerequisite to a successful bankruptcy reorganization).

Joseph Story, COMMENTARIES ON EQUITY PLEADINGS, §100, at 99-100 n.1 (9th ed. 1879). Thus mandatory class treatment might be proper if the corporate defendant "had become insolvent" and the plaintiffs "were compelled to look to a common fund in the hands of a receiver for the payment of their claims"—"they would then become claimants in a receivership." *Penn. Co. for Insurances v. Deckert*, 123 F.2d 979, 983 (3d Cir. 1941). But in a receivership "the *whole* administration and settlement of the estate is assumed by the court," *all* "the assets are *marshalled*," and the decree takes in and binds "*all* the creditors." COMMENTARIES, §99, at 96 (emphasis added).[32]

Here, only a gerrymandered subset of the class of Fibreboard's potential future asbestos personal injury creditors is subject to the Fifth Circuit's *pro rata* cram-down. All other personal injury claimants, as well as asbestos property damage claimants, banks, lenders and any other tort or trade creditors Fibreboard may have, are exempted from this ersatz receivership. Most important, Fibreboard's *shareholders* are exempt because it contributed a paltry $500,000 to the settlement fund, thereby retaining 99.8% of its equity. JA 84a, 104a; CA 329a. This is so despite the Fifth Circuit's own admission that a "limited-fund" action can proceed to bind "unknown or unavailable claimants" *only* when "such an action has before it for disposition *all the assets* in which class members could claim an interest." CA 84a (emphasis added). Creditors have an absolute "equitable right to be preferred to stockholders against the full value of all property belonging to the debtor corporation." *Kansas City Terminal Ry. v. Central Union Trust Co.*, 271 U.S. 445, 454 (1926). No receivership in which shareholders' equity is favored at the expense of creditors' claims could ever be deemed "equitable."[33]

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[32] *See also* COMMENTARIES, §99, at 97 n.1 ("'in the case of creditors of an insolvent estate . . ., all the parties interested in the fund must in general be brought before the court, so that there may be but one account, and one decree, settling the rights of all.'").

[33] "The words 'fair and equitable' are words of art; we have made unmistakably clear that compromising the rights of senior creditors to protect junior creditors is not 'fair and equitable' treatment." *United States v. Key*, 397 U.S. 322, 333 (1970)(Douglas, J., concurring). *See also Consolidated Rock Co.*

The decision below rests on the premise that the adoption of Rule 23(b)(1)(B) wrought a radical change in these ancient principles of equity governing rights in the case of insolvent judgment debtors. But it is inconceivable that the drafters of (b)(1)(B) intended to create a revolutionary new form of pseudo-receivership in which the debtor's equity is left untouched while those whom the corporate debtor has injured most grievously—the personal injury tort creditors—are forced to bear alone the entire brunt of a *pro rata* cram-down in the face of contrary state law.

Such modification of substantive state-law tort rights can, of course, be accomplished pursuant to the Bankruptcy Code, which "converts the creditor's legal claim into an equitable claim to a *pro rata* share of the *res*." *Katchen v. Landy*, 382 U.S. 323, 336 (1966). But Congress holds this power to modify substantive rights under Article I, § 8 of the Constitution, whereas the Rules Enabling Act expressly denies such power to the federal judiciary when promulgating procedural rules. "Rule 23, which must be interpreted with fidelity to the Rules Enabling Act," simply "cannot carry the large load [the settling parties] and the District Court heaped upon it." 117 S. Ct. at 2252.[34] Here, the Respondents have heaped upon Rule 23(b)(1)(B) a load even more crushing than that in *Amchem*.

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v. Du Bois, 312 U.S. 501, 529 (1941)(if creditors "receive less than that full compensatory treatment, some of their property rights will be appropriated for the benefit of stockholders without compensation. That is not permissible."); 11 U.S.C. §726 (absolute priority rule mandates distribution of assets in bankruptcy to creditors, including those with claims for "punitive damages," before any distribution to the debtor).

[34] The chairman of the Advisory Committee on Civil Rules, Fourth Circuit Judge Paul Niemeyer, recently warned that "[s]ome mass tort problems, such as how to resolve claims of those whose injuries have not yet manifested through a class device, simply cannot be resolved through the federal rules, and may never be amenable to an acceptable class solution." *Judicial Conference Approves Single Change to Federal Rule Governing Class Action Suits*, 66 U.S.L.W. 2182 (Sept. 30, 1997).

C. Rule 23(b)(1)(B) May Not Be Used As A Substitute For Bankruptcy.

This settlement class action is "a self-evident evasion of the exclusive legal system established by Congress for debtors to seek relief." *Keene Corp. v. Fiorelli*, 14 F.3d 726, 732 (2d Cir. 1993). In *Keene* the court rejected an effort by an insolvent asbestos defendant to impose a mandatory class settlement upon future asbestos victims as a substitute for the safeguards of bankruptcy. Although the courts below grudgingly accepted the bare proposition that the Bankruptcy Code governs the distribution of the assets of a company beset by more creditor demands than it can satisfy (CA 76a), they nevertheless concluded that they could do a better job. CA 74a-80a; JA 92a, 102a. The court of appeals criticized the supposedly "weak and uncertain position afforded future tort claimants under the Bankruptcy Code" (CA 79a), and held that Congress's statutory scheme was "inferior[] to a 23(b)(1)(B) class action in the instant case." CA 74a. That dismissive judgment is contrary to the overwhelming consensus, voiced by the National Bankruptcy Review Commission, that bankruptcy "provides safeguards for the interests of mass future claimants that are unmatched in the class action system."[35] More important, as the Second Circuit stressed in *Keene*, the federal courts are not empowered to "conduct trials over whether a statutory scheme should be ignored because a more efficient mechanism can be fashioned by judges." 14 F.3d at 733.

Undeterred by these separation-of-powers principles, the court below declared that Congress actually *intended* that "the terms and principles of the Bankruptcy Code would be circumvented" whenever a federal court and settling parties concocted their own "superior methods of asset distribution." CA 78a (citing 11 U.S.C. §305(a)(1)). But Congress neither enacted nor contemplated any

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[35] 1 REPORT OF THE NAT'L BANKR.REV. COMM'N 340-41 (1997) *See id.* at 335-41 & nn. 836, 843 & 846 (comparing bankruptcy and mandatory class actions and citing 20 articles criticizing latter as inferior protection for absent class members); *Keene*, 14 F.3d at 732 ("class members in cases such as this would have no say in the conduct of the court-appointed class representatives and unlike creditors in bankruptcy, are not able to vote on a settlement. *See* 11 U.S.C. § 1126. For them, it would be 'cram-down' from start to finish.").

such delegation to Article III judges and private litigants of the quintessentially legislative power arrogated by the courts below. Section 305(a)(1) merely allows a federal court to suspend a bankruptcy proceeding "if an arrangement is being worked out by creditors and the debtor out of court," H.R.Rep. No. 595, 95th Cong., 1st Sess. 325 (1977), thereby enabling knowing, identified creditors to agree to an alternative resolution with an insolvent debtor. It is an *abstention* provision designed to promote voluntary private ordering by economic actors. It is *not* a grant of *authority* to the federal judiciary to ignore the Rules Enabling Act, and to circumvent the Bankruptcy Code, by using Rule 23 to enact its own solutions that prospectively alter the substantive state-law rights of unknowing, unidentified, unconsenting tort victims. That federal legislative power is reserved to Congress.

Indeed, in the Bankruptcy Reform Act of 1994 Congress enacted special legislative relief for insolvent defendants overwhelmed by present and future asbestos-related liabilities. *See* 11 U.S.C. §§524(g) & (h). These provisions enable asbestos defendants in Chapter 11 proceedings to set up a trust for asbestos claimants and to redirect all future asbestos personal injury claims from the defendant to the trust. An asbestos defendant must convey to that trust a majority of its voting shares, §524(g)(2)(B), whereupon the bankruptcy court may issue an injunction barring all asbestos claimants from filing suit against the debtor or its insurers. §524(g)(4)(A)(ii)(III). These amendments were enacted "to provide explicit legislative guidance to ensure equitable treatment of mass future asbestos claimants." 1 REPORT OF THE NAT'L BANKRUPTCY REVIEW COMM'N 320 (1997). The federal courts are not free to disregard that legislative command and to undertake policy-making experiments of their own. "If Congress intended to reach the issue before the district court, . . . that is the end of the matter"; "'[f]ederal courts are bound to apply the rules enacted by Congress with respect to matters . . . over which it has legislative power.'" *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 (1988).[36]

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[36] The statute that enacted the asbestos amendments also established the National Bankruptcy Review Commission, whose first priority was addressing the problem of mass torts. 1 REP.NAT'L BANKR.REV.COMM'N at iv, 47. In 1997 the Commission submitted to Congress a host of detailed legislative proposals for handling mass future tort claims. *See id.* at 316-17, 322-34, 341-50.

Neither Respondents nor the courts below deny that Congress has provided special statutory relief for asbestos defendants, or that the courts below deliberately set out to craft a supposedly superior alternative to bankruptcy. Their only response is that bankruptcy was not an option in this case because Fibreboard was *unwilling* to go that route. CA 78a-79a; 376a. But this argument proves our point: Why should Fibreboard, or any other rational actor, *ever* swallow the tough medicine of Chapter 11 if it can convince a federal court to concoct, out of a procedural rule, an end-run around bankruptcy law that resolves its tort liability while leaving its equity intact?

III. DUE PROCESS REQUIRES THAT CLASS MEMBERS HERE BE GIVEN THE OPPORTUNITY TO OPT OUT.

The Fifth Circuit's judgment binding absent class members violated due process in two ways. First, it purported to release individual monetary claims for particularized tort damages without granting the plaintiffs a meaningful chance to opt out.[37] Second, the court purported to exercise personal jurisdiction over many individuals lacking any contacts with the forum state of Texas.

In class actions seeking to bind plaintiffs with respect to "claims wholly or predominantly for money damages," "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 & n.3 (1985). "In [*Shutts*], this Court listed minimal procedural due process requirements a class action money judgment must meet if it is to bind absentees; those requirements include notice, an opportunity to be heard, a right to opt out, and adequate representation." *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 888 (1996)

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[37] The "back-end" exit provided in the settlement is mere "window dressing," not a meaningful opt-out right (CA 133a n.30 (dissenting opinion)), in large part because the settlement's multiple limits on recovery restrict even jury awards. *See Amicus Curiae* Brief of the American Trial Lawyers Ass'n.

(Ginsburg, J., concurring in part and dissenting in part); *see also* 3 NEWBERG ON CLASS ACTIONS §17.16, at 17-44-45 ("when unliquidated damages are involved, the exclusion right must be afforded as a constitutional matter.").

Rule 23 codified the constitutional right to opt out for class members with damages claims. The Advisory Committee explained that subdivision (b)(3) was drafted to accommodate the compelling due process interests of such class members:

> [T]he interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of class certification alt[illegible]ther. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected. *Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request.*

39 F.R.D. at 104-05 (emphasis added). The opt-out right provided by Rule 23(b)(3) is an essential safeguard for the constitutional rights of absent class members claiming monetary damages. In *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) (*per curiam*), this Court opined that there is "at least a substantial possibility" that "actions seeking monetary damages . . . can be certified only under Rule 23(b)(3), which permits opt-out."

Respondents contend that class members have no opt-out rights because they have a unitary interest in the insurance policies. Fibre. BIO 26-27; Ins. BIO 25-26. And the district court held *Shutts* inapplicable here because this class action "seek[s] equitable relief." CA 495a. As shown above, this wishful thinking is belied by the claims pleaded in the complaint, which are classic examples of personal injury claims for money damages. Indeed, the Fifth Circuit itself conceded that "the central remedial and legal theory of each of the named plaintiffs [is] that Fibreboard is liable in tort for damages." CA 58a.

As demonstrated above, pages 16-17, 33-34, it is nonsense to suggest that these claims were somehow transmuted into a single *in rem* claim for equitable apportionment of a common fund by being "bound together" in the settlement with the asbestos victims' interest in Fibreboard's insurance policies. Fibre. BIO 27. Rule 23(b)(1)(B)

does not vest federal courts with the power to perform such alchemy. Nor was there any need for the personal injury claims to be "bundled" with the insurance settlement at all. The Trilateral Agreement settled the insurance dispute without limiting asbestos victims' tort remedies. The "bundling" was merely the product of negotiating strategies, Fibreboard's "corporate goal" of resolving its asbestos liabilities through insurance alone, and the Insurers' desire for total peace.

In any event, because this case involves *exclusively* money damages claims, it presents an even more straightforward inquiry than did *Adams v. Robertson*, 117 S. Ct. 1028 (1997) (*per curiam*), and *Ticor Title*, which were suits involving claims for both monetary and equitable relief. *Adams*, 117 S. Ct. at 1029; *Ticor Title*, 511 U.S. at 120. This case involves solely the kind of individual claim that occupies the zenith of what this Court has unanimously described as "our deep-rooted historic tradition that everyone should have his own day in court." *Richards v. Jefferson County*, 116 S. Ct. 1761, 1766 (1996). Many of the class members here will suffer disabling injuries or will lose their lives as a result of Fibreboard's torts. "'Each plaintiff [in an action involving claims for personal injury and death] has a significant interest in individually controlling the prosecution of [his case]'; each 'ha[s] a substantial stake in making individual decisions on whether and when to settle.'" *Amchem*, 117 S. Ct. at 2246 (quoting Third Circuit).

The use of a mandatory class here also implicates the principles governing judicial exercise of personal jurisdiction. Under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), a federal court sitting in diversity must look to the law of the state in which it sits to determine whether personal jurisdiction exists. *See Walker v. Armco Steel Corp.*, 446 U.S. 740, 753 (1980); *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 221-24 (2d Cir. 1963) (Friendly, J.). In this case, a state court could not exercise personal jurisdiction over class members lacking minimum contacts with the forum state of Texas without affording them an opportunity to opt out. *See Shutts*, 472 U.S. at 812. By certifying this non-opt-out class and approving the settlement, the courts below impermissibly exercised jurisdiction over petitioners Allgood, Evers and Taylor (Alabama residents lacking any contacts with Texas), as well as over hundreds of thousands of other persons who have never been to Texas, do no

business there, and could not be haled into court there without their consent.

Although *Shutts* itself involved a state court, this principle of personal jurisdiction, which arises because of the *Erie* doctrine, is not limited to state courts. And "[t]he disadvantages of distant forum abuse are not mitigated by the forum's federal rather than state character." Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1, 31 (1986). Therefore, at the very least, the non-Texas class members could not be bound by this class judgment because they were denied the right to opt out.

IV. NOTICE TO CURRENTLY UNINJURED "FUTURE CLAIMANTS" CANNOT MEET THE REQUIREMENTS OF RULE 23 AND DUE PROCESS.

In *Amchem* this Court explained that inherent impediments to adequate notice "rendered highly problematic any endeavor to tie to a settlement class persons with no perceptible asbestos-related disease at the time of the settlement." 117 S.Ct. at 2252. Although *Amchem* involved a Rule 23(b)(3) class, for which notice is mandated by Rule 23(c)(2), the Court relied in its notice analysis on the dissenting opinion of Judge Smith in this case, which involves a Rule 23(b)(1)(B) class, for which notice is mandated by Rule 23(e). 117 S.Ct. at 2252 (citing CA 113a-118a).[38] The Court observed that many class members "may not even know of their exposure [to asbestos], or realize the extent of the harm they may incur." *Id.* And, "[e]ven if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently," whether to accept or object to the settlement. *Id.* Although this Court did not "rule, definitively,

[38] Notice was vital (and compelled by both due process and Rule 23(c)(2)) in *Amchem* in order that class members be afforded a meaningful opportunity to evaluate the proposed settlement and exercise their rights under Rule 23(b)(3) to opt out of the class. Here, notice was equally vital (and compelled by both due process and Rule 23(e)) in order that class members be afforded a meaningful opportunity to evaluate the proposed settlement and decide whether to object to it. *See, e.g.*, 7B Charles A. Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 1797, at 365 n. 48, 372-73 (1986).

on the notice given" in *Amchem*, the Court nonetheless indicated its grave doubts "whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous." *Id.* The district court's findings about the size and expense of the notice campaign did not detain this Court in *Amchem*; the issue was (as it is here) whether meaningful notice to unidentified, unknowing, future tort victims is impossible *as a matter of law*.[39]

Respondents do not contest *Amchem*'s conclusion that adequate notice cannot be given to future claimants. They argue only that, since meaningless and ineffective notice is all that can be achieved here, only that sort of "notice" is required by the Constitution in a mandatory class action, citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Ins.BIO 27-28. But *Mullane* did not involve a class action. It involved a state judicial procedure for pooling small pre-existing trusts for administrative efficiency—a step that did not reduce any trust beneficiary's stake, 339 U.S. at 308-309—and individual notice was easily sent to most of the beneficiaries along with their regular trust fund checks. *Id.* at 318. Because of the "vital interest of the State in bringing any issues as to its fiduciaries to a final settlement" under a special state-legislated statutory scheme, *id.* at 313, the Court allowed, despite inherent notice problems, the release of potential claims against the trustee for improper management—claims that were derivative of the trust beneficiaries' *in rem* claims against the trust itself.

[39] Such doubts have led many authorities to conclude that "future claims will not and cannot be bound by the class action litigation. Toxic torts giving rise to latent illnesses and defective products with latent risks are two examples." 3 NEWBERG ON CLASS ACTIONS § 17.39 at 17-119. Acknowledging the due process limits on releases of future personal injury claims, *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985), concluded that it would be "absurd" to require a healthy future claimant who had been exposed to a toxin, "a person who had no inkling that years in the future he would be killed," to file a claim in a bankruptcy reorganization proceeding today. *Id.* at 943. Similarly, *In re Amatex Corp.*, 37 B.R. 613 (E.D.Pa. 1983), *rev'd on other grounds*, 755 F.2d 1034 (3d Cir. 1985), concluded that "[n]o genuine or meaningful notice can be given to individuals who cannot know of a future cause of action." *Id.* at 614.

Here there is no vital state interest sufficient to compel the release of hundreds of thousands of valuable, individual, and independent state-law personal injury claims held by a vast class of unknowing future asbestos victims. Indeed, this mandatory class action tramples the important state policies that protect tort victims through awards of full compensation, punitive damages, and interest. When such fundamental and quintessentially personal legal rights are at stake, if meaningful notice cannot be provided (as is undisputed here), due process requires that the class members be left to bring their claims as they arise, rather than be deprived of them now, without their knowledge or consent.

V. THIS CLASS ACTION IS NOT A JUSTICIABLE CONTROVERSY UNDER ARTICLE III.

The decision below endorses the use of federal judicial power to enact a prospective change in the state-law rights of unconsenting, unknowing future asbestos tort victims who have no injuries and no ripe legal claims. It is hard to avoid Judge Smith's conclusion that "[t]his case shatters the constitutional limits placed on the authority of the federal courts by Article III." CA 155a. "When we depart from th[e] role" of resolving actual cases and controversies by accepting proposals for "private dispute resolution mechanisms, we quickly find ourselves acting more as legislative policymakers than as judges." CA 154a.

A. This "Class Action" Is a Feigned Proceeding.

Fibreboard wanted to redirect and limit the entirety of its future asbestos tort liability to its remaining insurance policies, so it solicited several cooperative plaintiffs' lawyers to arrange a global settlement. *See* pages 2-3, *supra*; CA 41a. The district court judge choreographed the ensuing "proceeding." The Fifth Circuit noted that, while presiding over different lawsuits between Fibreboard and its Insurers over the terms of the policies (CA 40a, 42a), Judge Parker directed class counsel and Fibreboard to work together on—to "negotiate"—a new lawsuit, which the district court formulated as "a Rule 23(b)(1)(B) settlement class composed of future plaintiffs with claims against Fibreboard." CA 45a. Those negotiations involved not the resolution of *existing* legal claims for

actual injuries, but the establishment of an elaborate ADR process to take control of *future* asbestos claims against Fibreboard.

Of course, with respect to those plaintiffs who had been exposed to Fibreboard's asbestos but had not yet experienced injury (the vast majority of the class), Class Counsel could not predicate federal jurisdiction on claims for future lung cancers or other injuries that hadn't yet occurred, because such unripe claims would lack any present injury. So on behalf of the "exposure-only" future plaintiffs, Class Counsel could plead only claims for "fear of cancer," "enhanced risk of developing cancer," and "damages tied to the need to undergo medical monitoring to detect the early development of asbestos-related disease." CA 222a. Yet Class Counsel testified under oath that: (1) they believed that these exposure-only claims were not "compensable" causes of action; (2) they had never before in their lives filed such claims; and (3) they, like the other Respondents, never had any intention of actually litigating this class action. *See supra* pages 5-6. Fibreboard's counsel testified that Fibreboard had never settled or paid a judgment on such an exposure-only claim, nor did he know of any asbestos defendant that had. JA 95a-98a. And the Insurers apparently concede that class members "could not as of this moment recover money damages under state law," and proudly state that the class "brought this action *not* to recover damages now," but to set up a more efficient claims process for the future. Ins.BIO 30 (emphasis added).

Remarkably, the district court recognized that the pleadings were a *pretext*: "This action was filed to obtain judicial approval of a class settlement which . . . will resolve all *future* asbestos-related personal injury claims against Fibreboard." CA 183a (emphasis added). The Fifth Circuit likewise admitted that the parties "clearly did not intend to litigate the complaint." CA 86a. It therefore comes as no surprise that the settlement ADR process does not redress *any* of the claims pleaded in the complaint: there are no damages for "risk" of cancer, no subsidies for "medical monitoring" or psychotherapy for "fear" of cancer. CA 104a (Smith, J., dissenting). Therefore, the "*only* reason" to plead those claims in the complaint "was to manufacture jurisdiction over class members who have not yet manifested symptoms of asbestosis or otherwise suffered a legally cognizable injury." CA 104a-105a.

Respondents unanimously agree. Abandoning their own sham pleadings, the plaintiffs and defendant now say that Article III jurisdiction and standing are predicated on the class's "interest in the outcome of an existing [insurance] coverage dispute"—"an interest [that] was pleaded in the complaint (CA. 556a-59a)." Class BIO 28; Fibre BIO 28. But as explained *supra*, page 16, that "interest" was mentioned in the complaint solely as *background* material. It was not and could not have been *pleaded as a justiciable claim* here because—as Respondents admit, Class BIO 28—the insurance dispute was actually pleaded and litigated *not in this case*, but in the California state court case, and the fairness of the settlement of that dispute was then litigated as a declaratory judgment in *Rudd*.

Class Counsel ask this Court to pretend that this asbestos tort class action is really an insurance coverage case in disguise, insisting that they "could have properly litigated that interest" and "could have proceeded as a mandatory" class action on that issue. Class BIO 28, 29. Evidently it's all the same to the Respondents, since the pleadings and this lawsuit are a charade in any event. But the legal claims that founded jurisdiction in *Rudd* to adjudicate the rights of the class against the Insurers simply cannot provide jurisdiction here to resolve the personal injury tort claims that the class holds against Fibreboard.[40]

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[40] Class Counsel suggest that this Court can cure their failure to allege genuine, justiciable claims by "deem[ing] the pleadings amended to conform to the matters raised and the evidence adduced at the fairness hearings," pursuant to Fed.R.Civ.P. 15(b) and 28 U.S.C. § 1653. Class BIO 29. That is absurd. (1) Respondents' problem is not that, by some oversight, they carelessly pleaded a "defective allegation of jurisdiction," § 1653. The problem is that the pleadings were a sham and this is a feigned case. (2) The coverage dispute that they say they "could have" pleaded and then litigated at the fairness hearing was *not* in fact litigated at that hearing, so there is nothing to which the defective complaint can be "conformed." Indeed, the very purpose of that proceeding (and of the Global Settlement itself) was to *avoid* a judicial decision on the coverage issues. (3) Even if this Court were to pretend that the hypothetical claims involving the class interest *in favor* of insurance coverage for Fibreboard had been alleged and proven, those claims would not enable the class to seek approval of the Global Settlement, because that settlement extinguishes entirely *different* claims—namely, the class members' individual personal injury claims *against Fibreboard*. *See* note 10, *supra*.

This case fails the requirements of Article III. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court." *Steel Company v. Citizens for a Better Environment*, 118 S.Ct. 1003, 1019 (1998). The filing of the complaint was orchestrated by the settling parties solely as part of their joint effort to foist their negotiated tort reform proposal upon the class. Article III jurisdiction may not rest upon such a "contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist." *City of Dawson v. Columbia Ave. Saving Fund*, 197 U.S. 178, 181 (1905).

Respondents contend that the justiciability of collusive settlements was resolved long ago by cases like *Swift & Co. v. United States*, 276 U.S. 311, 326 (1928), Ins.BIO 28-29 & n.*; Fibre BIO 28. But each of those consent-decree cases involved an actual contemplated lawsuit and an imminent litigable dispute that would have transpired if the consent decree were not issued, whereas here it is undisputed that the class never had any intention of litigating the class complaint, which was filed solely to provide the district court with a jurisdictional hook.[41]

Worse still, the district court itself participated in this charade. Just last Term, in *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055 (1997), this Court unanimously rebuked the Ninth Circuit for offering "suggestions" and "instructions" to friendly parties on how to "place" an issue before a federal court in a way that superficially appeared to be a justiciable controversy. 117 S.Ct. at 1065 & n.15. The Respondents here likewise "took the steps the [federal court] prescribed" in order to sustain the pretense of a justiciable controversy. 117 S.Ct. at 1070. *See* page 3, *supra*. And the constitutional vice was the same: "In advancing cooperation between" the parties on the framing of the proceeding for submission

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[41] If the defendants in those cases had not consented to judicial approval of the decrees, the parties would have gone back to litigating, because those cases involved continuing conflict over *future* misconduct by the defendants that had to be addressed by an injunction. *See Swift*, 276 U.S. at 326; *SEC v. Randolph*, 736 F.2d 525, 527-28 (9th Cir. 1984). The consent-decree cases are also distinguishable because they were all cases brought by government agencies that, while settling the government's claims, preserved rather than extinguished the rights to sue of individuals injured by the defendant. *E.g., Rodgers v. U.S. Steel Corp.*, 536 F.2d 1001, 1003 (3d Cir. 1976).

to a federal court, the courts below "did not home in on the federal courts' lack of authority to act in friendly or feigned proceedings." 117 S.Ct. at 1070 (citing *United States v. Johnson,* 319 U.S. 302, 304 (1943)).

If anything, the abuse in this case is greater than that condemned by this Court in *Arizonans*. Here it was not just a question of rigging the appeal posture to resurrect the justiciability of a once-live legal dispute. In this case, there was no justiciable controversy *at any time*. This "case" is a legislative joint venture, not an adversarial lawsuit.

B. The "Exposure-only" Class Members Have No Injury in Fact.

To establish standing under Article III, a litigant must demonstrate that he has suffered an "injury in fact": "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Here virtually the entire plaintiff class consists of people who have been exposed to asbestos but who have no actual injuries. They allege no disease, no physical impairment, just "risk" or "fear" of *future* injuries. CA 222a. Such "[a]llegations of possible future injury do not satisfy the requirements of Article III." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). *Id.* As the dissent explained in great detail below (CA 154a-180a), the vast majority of the exposure-only class members in this diversity suit cannot show "an invasion of a *legally protected interest,*" *Lujan*, 504 U.S. at 560 (emphasis added), sufficient to confer standing, because the substantive tort law of most states affords no cause of action for mere exposure to a toxin. CA 174a & n. 75. *Amchem*, 117 S.Ct. at 2244 n.15; *Metro-North Commuter R.Co. v. Buckley*, 117 S.Ct. 2113, 2118 (1997) ("with only a few exceptions, common law courts have denied recovery to those [exposed to asbestos or other toxins] who . . . are disease and symptom free")(collecting cases).[42]

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[42] Although the district court's holdings on subject matter jurisdiction and "good faith" pleading of these exposure-only claims were predicated on the supposed availability of recovery for such actions in California, where Fibreboard resides (CA 222a), Class Counsel conceded that there is no "recoverable" cause of action in California for risk or fear of cancer without actual physical injury. *See supra* page 6.

This Court has unanimously held that the question of whether the plaintiff has a "legally protected interest," and hence standing, is "'a question of substantive law, answerable by reference to'" the rule of law "'whose protection is invoked.'" *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991). Therefore, "when a state has declined to give life to a cause of action at all, federal courts sitting in diversity also must refuse to entertain that cause of action." CA 178a (Smith, J., dissenting).[43]

A federal court has no jurisdiction if the plaintiff's "claim 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.'" *Steel Co. v. Citizens*, 118 S.Ct. at 1010. The "Article III requirement of remediable injury in fact" is not fulfilled where the plaintiff pleads only "entirely frivolous claims." *Id.* at 1013 n.2. Therefore, in the case at hand, "[a]ny claims not authorized by state law should have been explicitly excised" from the class complaint because the district court lacked jurisdiction over them under Article III. CA 180a (Smith, J., dissenting).

Strict enforcement of the "actual injury" requirement is essential because it is "a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches." *Lewis v. Casey*, 116 S.Ct. 2174, 2179 (1996). The courts below forsook this principle, venturing instead into the legislative domain. And Article III standing requirements have a federalism dimension as well: they are "'a part of the basic charter . . . providing for the interaction between the [federal] government and the governments of the several states.'" *Spencer v. Kemna*, 118 S.Ct. 978, 985 (1998) (ellipsis and brackets in original). The Fifth Circuit's legislative adventures thus invade the prerogatives of both Congress and the States.

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[43] The question is not whether the plaintiff will win on the merits, but whether it is even arguable that such a cause of action even *exists* under the substantive law of the governing jurisdiction, and thus whether the plaintiff's allegations of injury, in the context of that cause of action, satisfy Article III.

CONCLUSION

The judgment below should be reversed and the case remanded with instructions to decertify the class and to dismiss the action for lack of a justiciable controversy.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1997

ESTEBAN ORTIZ, *et al.*,

Petitioners,

—v.—

FIBREBOARD CORPORATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS CONTINENTAL CASUALTY COMPANY, CNA CASUALTY COMPANY OF CALIFORNIA, COLUMBIA CASUALTY COMPANY, PACIFIC INDEMNITY COMPANY AND FIBREBOARD CORPORATION

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CORPORATE DISCLOSURE

The following are parents of respondents Continental Casualty Company, CNA Casualty Company of California and Columbia Casualty Company: CNA Financial Corporation; Loews Corporation. The following are non-wholly-owned subsidiaries of respondent Continental Casualty Company: Convida Holdings, Ltd.; Convida Compania de Seguros de Vida S.A.; Agency Management Services, Inc.

The following are parents of respondent Pacific Indemnity Company: The Chubb Corporation; Federal Insurance Company. There are no non-wholly-owned subsidiaries of respondent Pacific Indemnity Company.

Respondent Fibreboard Corporation is a corporation. Its parent company is Owens Corning. It has no non-wholly-owned subsidiaries.

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Counter-Statement Of The Case

I. Preliminary statement

The Global Settlement Agreement before this Court accomplishes the following:

1. It settles three interrelated sets of disputes — (a) a 14-year-long insurance coverage dispute between Fibreboard and its insurers (Continental and Pacific), (b) the direct claims against those insurers by a class of future asbestos victims and (c) the class's claims against Fibreboard — in return for payment by those insurers of $1.525 billion in cash, for Fibreboard's agreement to turn over that $1.525 billion to a trust for the benefit of the class and for a further $10 million direct payment to the trust by Fibreboard itself;

2. Although not resolving the claims of individual claimants, it creates an independent compensation trust designed to administer claims and pay claimants expeditiously and to reduce transaction costs drastically — including providing a cap on contingency fees — while at the same time preserving to each claimant individual control over his or her claim, including the option of recourse to the tort system.

This appeal thus presents this Court with a challenge to a $1.535 billion global settlement entered into by three "parties," each one of which faced a risk of catastrophic financial loss absent the settlement. A *class* of upwards of 150,000 future asbestos victims was freed from what the courts below found was the very real risk that Fibreboard might ultimately lose its coverage disputes with the insurers, which would have left all class members with no source of recovery and rendered all their claims worthless in practice. CA 52a, 75a-77a, 357a.* The *insurers*, in return for payment of over $1.5 billion, were

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* As used in this brief, "CA" refers to the appendix submitted with the petition for certiorari; "JA" to the joint appendix; "Fib. App." to the appendix to the brief in opposition filed by Fibreboard; "Br." to petitioners' brief; "Class Br." to the brief filed by the Plaintiff Class; "Class BIO" to the brief in opposition filed by the Plaintiff Class; and "5th Cir. JA" to the joint appendix in the Fifth Circuit.

released from potentially open-ended and unprecedented liability on the insurance policies, which — while strenuously disputed — left a cloud over both companies until resolved. And *Fibreboard*, having successfully secured from its insurers the availability of real and fair compensation for those persons injured by exposure to the asbestos products it had manufactured, ensured the continued viability of the company for its employees, other creditors and owners.

Strikingly, petitioners do not contest the financial fairness of the Settlement. For all the myriad objections they advance, petitioners have never challenged the District Court's finding, confirmed by the Fifth Circuit, that the Global Settlement is fair as well as "far preferable" to *any* other practical alternative. CA 360a, 366a. Moreover, for all petitioners' professed solicitude for class members, they ignore the lower courts' finding that, *absent* the Global Settlement, those very class members would face a "significant risk" that their only source of meaningful compensation — the disputed insurance — would be lost. CA 52a, 357a; *see* pp. 15-16, *infra*. And finally, petitioners also ignore the District Court's finding that the risk to the class posed by the coverage disputes could be resolved "only" through a unitary resolution involving the class, that "[r]esolution of the insurance dispute required a unitary settlement in a proceeding in which all claims were compromised." CA 232a, 241a, 490a; *see* pp. 16-19, *infra*.

Instead, petitioners simply ignore these findings and choose to create their own preferred "facts," painting a picture in which the class actually had "unlimited" insurance at its disposal and in which the Global Settlement was actually a "gratuitous" infliction on a class that had no reason at all to enter into a settlement. *E.g.*, Br. 2, 9 n.9. They then invoke a series of purported categorical "rules" that they contend under those circumstances bar a class settlement. As shown below, petitioners have contrived both their presentation of the case and these supposed rules out of whole cloth: the risk of the coverage disputes and the need for a unitary class settlement were real indeed; and, under well-established rules of law, the

lower courts' approval of this indisputably fair Global Settlement was correct in all respects.

II. Background

A. The insurance coverage disputes.

Fibreboard, a company facing an overwhelming number of asbestos claims — both present and anticipated — had less than $250 million in non-insurance assets, an amount manifestly insufficient to satisfy even a fraction of its liabilities to the class. CA 38a, 42a, 377a. Indeed, by 1993, when the Global Settlement was negotiated, these assets were dwarfed by more than $1.2 billion in unpaid settlement obligations to *prior* asbestos claimants, thus leaving virtually *nothing* for future claimants. CA 42a. Fibreboard did, however, have two potentially very valuable insurance claims, on which rode both Fibreboard's corporate survival and class members' chances of obtaining any meaningful recovery.

These insurance claims arose from two policies allegedly issued by Continental and Pacific for a period of less than three years back in the 1950s. CA 38a. *First*, although it could not actually locate any copy of the policy, Fibreboard claimed that Pacific had insured it for one year from 1956-57, and that this policy had a $500,000 per-claim limit but no aggregate limit on total coverage. CA 267a. *Second*, Continental in 1957 had issued a three-year policy to Fibreboard for a premium of less than $10,000 per year — which policy, however, was cancelled by Fibreboard in March 1959 after only 22 months. The policy had no aggregate limit on coverage, but did have both a $1 million "per-occurrence" limit and a $500,000 "per-person" limit. CA 38a, 267a. Fibreboard claimed coverage that the insurers disputed.

In 1979, Fibreboard sued the insurers on these policies in California state court. Because the great majority of the asbestos claims against Fibreboard arose out of (i) exposures *prior* to the 1956-59 policy periods and (ii) diseases that (as a result of long latency periods) did not become manifest until long *after* those years (CA 254a, 260a-61a), any interpretation

of the policies that required *either* "exposure" or "manifestation" of disease to have occurred *during* the policy years would have done Fibreboard (and class members) very little good. Accordingly, Fibreboard argued in this coverage case that the two policies provided coverage for each of hundreds of thousands of claimants whose first exposure to asbestos preceded March 1959: even if *none* of the exposure actually took place during the 1956-59 policy years; and even if manifestation of the diseases did not occur until many years after the expiration of the policies. CA 39a, 268a. And Fibreboard maintained that, without an aggregate limit, there was no ceiling to the insurers' liability. Thus, to succeed on its claims, Fibreboard needed to prevail on each and every one of the following issues.

First, in the original coverage case, Fibreboard needed to establish:

- that the policies should be read to cover all claimants exposed to Fibreboard asbestos at *any* time prior to March 1959 — *i.e.*, at any time in the decades going back to the 1930s and even if the disease did not appear until decades after the policies had terminated. CA 268a.*
- that the "scope" of coverage should in no way be pro-rated to reflect the short period of time in which the policies were in force, but instead extended to the *full* amount of Fibreboard's liability and defense costs for exposures during all the many years prior to the

* To obtain such a "continuous trigger" ruling, Fibreboard needed the court to reject federal precedents holding that coverage under asbestos insurance policies was triggered only where the claimant's *exposure* took place during the policy period (an "exposure" trigger) or where the claimant's disease *appeared* during that period (a "manifestation" trigger), approaches that would have either curtailed Fibreboard's claimed coverage or eliminated it altogether. *See, e.g., Ins. Co. of North America v. Forty-Eight Insulations*, 633 F.2d 1212, 1218-23 (6th Cir. 1980) (exposure trigger); *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 25 (1st Cir. 1982) (manifestation trigger); *see also Zurich Ins. Co. v. Raymark Indus., Inc.*, 514 N.E.2d 150 (Ill. 1987).

policies' termination — even though the policies were in force for only a small fraction of that time. CA 268a.*

- that the $1 million "per occurrence" limit under the Continental policy — and the policy's definition that "[a]ll . . . exposure to substantially the same general conditions existing at or emanating from each premises location shall be deemed one occurrence" — somehow did *not* limit coverage to $2 million (one "occurrence" for each of the two Fibreboard asbestos plants) or even to one "occurrence" for each shipyard or construction site at which Fibreboard asbestos was used. Instead, Fibreboard needed to persuade the court that — notwithstanding the policy's independent $500,000 "per person" limit — "occurrence" meant each *individual person's exposure to asbestos*. CA 269a.
- that unique language in the Continental policy should not be construed to require a "double anchor" — *i.e.*, to limit coverage to claims where both the "exposure" *and* "manifestation" occurred during the policy period. CA 270a.
- that the "missing" Pacific policy had actually existed and contained no aggregate limit on coverage. CA 268a.

* Thus, per Fibreboard, even if the Continental policy had been terminated by Fibreboard after 22 minutes or 22 days — rather than 22 months — at the very moment the policy came into existence, Continental had *eo instante* assumed *full* liability for all the hundreds of thousands of claimants who had been exposed to asbestos in *all* preceding decades, notwithstanding that a plaintiff's disease did not manifest itself until after the policy had been terminated. On this point as well federal precedent had gone the other way. *See, e.g., Ins. Co. of North America v. Forty-Eight Insulations*, 633 F.2d at 1224-25; *Gulf Chemicals v. Associated Metals & Min. Corp.*, 1 F.3d 365, 371-73 & n.4 (5th Cir. 1993) (citing cases).

Second, during the 14 years in which these issues were pending before the California courts in the original coverage case, Fibreboard's coverage claims were placed in additional jeopardy for new and separate reasons. During that period, Fibreboard — devoid of cash with which to deal with pending asbestos claims, and concededly in part as a device to pressure Continental to the table — began a massive program of "assignment" settlements. CA 40a, 292a; *see* Class Br. 6-7. Fibreboard proceeded to "settle" with tens of thousands of asbestos plaintiffs by paying them no money of its own, but simply by assigning to them hundreds of millions of "Continental dollars": agreed-upon "settlement" amounts (more than double previous settlement norms) that the claimants would then collect from *Continental* if Fibreboard prevailed in the coverage litigation. CA 40a-42a. Continental, for its part, strenuously disputed Fibreboard's right to make such "assignment" settlements without its consent, and claimed them to constitute a major breach of the underlying insurance policy forfeiting any coverage that Fibreboard might otherwise be able to establish. CA 287a-88a. This "assignment" dispute touched off a separate round of litigation, beginning with a case in California state court entitled *Andrus v. Fibreboard*. CA 41a. Fibreboard, thus, needed to prevail in this "assignment" dispute as well.

Initially, Fibreboard was successful in each of these litigations. In 1990, 11 years after the case was brought, the coverage-case trial court issued a judgment almost entirely in Fibreboard's favor. CA 39a, 268a-69a. In 1992, the *Andrus* trial court upheld Fibreboard's claim that it was entitled to enter into assignment settlements without Continental's consent. CA 41a. These rulings exposed the insurers to unquantifiable, uncapped liability, and appeals were taken to the California Court of Appeal. In the coverage case, successive oral arguments were held over a period of months in 1993, the last on August 27, 1993, the same day that an agreement in principle on the Global Settlement in this case was finally reached.

CA 270a.* The separate *Andrus* appeal was not argued until October 1994.

B. Efforts to resolve the coverage dispute on a *non*-unitary basis fail.

Fibreboard and the asbestos plaintiffs were keenly aware of what the District Court and the Fifth Circuit in this case found to be the "significant risk" that Fibreboard would lose all or most of its claimed coverage in these appeals. CA 52a, 75a, 357a; *see* pp. 15-16, *infra*. For their part, the insurers were quite cognizant of the enormous risk that potential unlimited liability posed to them. CA 75a. As a result, Fibreboard, the insurers and the asbestos plaintiffs all attempted separately to find ways to resolve the disputes. Years of efforts toward non-unitary, piecemeal solutions involving different subsets of the parties, however, totally failed to produce a resolution.

First, Fibreboard tried to get Continental to settle directly with *it*, without the direct participation in the settlement of the asbestos plaintiffs. But although Fibreboard and Continental repeatedly discussed a direct "bilateral" settlement beginning in 1988, as late as the summer of 1993 — with the potential final argument in the coverage appeal only two months away — they were not even close on price: Fibreboard demanding a sum sufficiently "cushioned" to ensure its survival in the face of continuing asbestos claims and defense costs, and Continental insisting that the settlement amount should be at a significant discount to Fibreboard's projected liabilities to reflect the substantial issues that existed with respect to coverage. CA 282a, 301a, 314a, 330a; Fib. App. 18a, 32a-34a. As counsel for both parties testified, and as the District Court found, it "was very clear" that there was "no chance" of a separate Continental-Fibreboard deal under these circumstances. JA 76a-77a, 227a; CA 232a, 330a.

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* Because any further review of the appellate court's decision would be discretionary with the California Supreme Court, all parties needed to assume that the appellate court's decision could be final.

Second, Fibreboard attempted to use the assignment program as a means by which it could conceivably accomplish an overall settlement with the *class plaintiffs* — without the participation of the insurers. It thus proposed to the leading members of the asbestos plaintiffs' bar a "global" class action settlement-by-way-of-assignment, under which class members would look to an "assigned" overall amount from *Continental* were Fibreboard to prevail in the coverage litigation. CA 41a.* Although negotiations for such an "assignment" global settlement continued over a period of two years from 1991-92, they ultimately proved unsuccessful. CA 300a-01a. The major problem was that neither side could develop a workable solution for addressing the problem of opt-outs from the class. *Id.*

Finally, there was no prospect at all of a settlement involving the insurers and the class plaintiffs without Fibreboard's participation — since *Fibreboard* owned the policies. Indeed, the plaintiffs refused to negotiate with the insurers without Fibreboard's participation, and Fibreboard had actually procured a contractual pledge as part of "assignment" settlements that no plaintiff-Continental negotiations would take place without its participation. CA 42a, 301a.

C. Negotiations toward a unitary Global Settlement take place and ultimately succeed.

Fibreboard's assignment program spawned a series of actions by which Fibreboard sought court orders validating particular assignments.** By far the largest of these actions, involving an assignment settlement of over 20,000 claims for over $200 million of Continental's money, was brought by Fibreboard in the Eastern District of Texas in January 1993. CA 42a, 302-03a.*** Faced with the uncertainty of the outcome of this

* Fibreboard and the class plaintiffs also hoped that the prospect of such a global "assignment" settlement would still further increase pressure on Continental. CA 41a-42a; *see* Class Br. 8-9.

** The assignment settlements were conditioned on Fibreboard's obtaining such court orders. Class Br. 6.

*** Although the *Andrus* trial court had by this time issued its ruling validating Fibreboard's right to make assignments, that ruling was on

massive action, with the threat of a multi-billion-dollar global "assignment" settlement and with the appellate argument in the coverage case appeal looming, Continental decided to change course. At a March 1993 pre-trial conference before the District Court, Continental announced that it would be willing to settle, but only as part of a global resolution involving both Fibreboard *and* the class plaintiffs. With all parties' approval, the District Court appointed a mediator (Judge Patrick Higginbotham) to assist in ensuing discussions. CA 43a, 304a.*

The parties then began intensive negotiations toward a global settlement. As detailed more fully in the Plaintiff Class's brief and in the District Court's findings of fact (CA 305a-19a), these negotiations were hard-fought and marked by numerous break-downs and walk-outs by various parties. With Judge Higginbotham's active assistance, however, the parties gradually cleared away impediments to a settlement:

- In April 1993, in return for Fibreboard's agreement to cease its assignment program and to permit Continental to negotiate directly with the class plaintiffs, a critical threshold agreement was reached whereby Continental agreed that the cost of any global settlement would be borne entirely by the insurers and that

appeal, and under California law was therefore not entitled to preclusive effect. Moreover, the reasonableness of the settlement values in each particular assignment settlement had to be determined separately.

* These *facts* totally belie petitioners' insinuation that the District Court injected itself into the dispute "before a lawsuit was even filed." Br. 3. Before taking a single action with respect to the negotiations that led to the Global Settlement, the District Court had before it a case: (a) asserting the rights of over 20,000 asbestos claimants to the proceeds of Fibreboard's claimed insurance; (b) whose filing was concededly intended by Fibreboard and the claimants to pressure the defendant, Continental, into seeking an overall resolution of Fibreboard's asbestos exposure; and (c) where Continental had informed the court that it would be willing to settle only as part of such an overall resolution. CA 42a-43a. And even then, the District Court did not itself participate in the negotiations, but rather appointed a separate mediator to assist the parties. *Id.*

Fibreboard would not have to contribute any of its non-insurance assets to such a settlement. CA 308a-10a.

- In June 1993, plaintiffs' counsel — having received and reviewed legal analysis supplied by Continental to Judge Higginbotham that a non-opt-out class was legally permissible, as well as essential, given the particular circumstances of the case; and having seen their prior efforts with Fibreboard toward a global "assignment" settlement founder on an inability to solve the problems presented by opt-outs — moved off of their initial negative position and agreed that when negotiations resumed, it would be on the basis that a global settlement would be a mandatory one under Rule 23(b)(1)(B). CA 312a-15a.
- In July 1993, Judge Higginbotham advised the parties that his observations of the negotiations had persuaded him that a single settlement involving both "present" and "future" claims was "too complex," that a potential class settlement should be limited to future claims only, and that Continental should first settle the pending claims separately. In this way, those settlements could then be used as a benchmark for negotiating the price of the "futures" class settlement. CA 44a, 316a-18a.
- By August 5, 1993, Continental — pursuing this recommended course — had renegotiated Fibreboard's principal "assignment" settlements of pending claims into Continental-approved settlements. CA 318a-19a.

On August 9, 1993, with these issues resolved — and with final argument in the coverage case appeal now less than three weeks away — Judge Higginbotham by formal letter to the District Court requested the designation of Messrs. Rice, Cox, Kazan and Wartnick to negotiate toward a global settlement, a request that was honored by the District Court. CA 45a, 320a. The intense negotiations that ensued are described in the Plaintiff Class's brief. Class Br. 11-12. Finally, at midnight on the night of August 26, 1993 — with the coverage case appeal to be

argued in California the following morning — the parties reached an apparent agreement in principle on a $1.535 billion settlement amount for a Global Settlement. CA 46a.

The next morning, however, class counsel pressed a final condition: the class would not enter into the Global Settlement unless Fibreboard and the insurers separately entered into a "back-up" "Trilateral" settlement of the coverage disputes to operate in the event that the Global Settlement were successfully challenged. CA 46a.* Consistent with Fibreboard's and Continental's longstanding inability to agree on any such settlement (*see* p. 7, *supra*), however, Fibreboard and the insurers were sharply divided over the price of such a "back-up" arrangement. The insurers adamantly refused under a Trilateral agreement to fund Fibreboard for its exposure to "futures" claims for one dollar more than they had agreed to pay for those claims under the Global Settlement; Fibreboard, by contrast, insisted that it needed far more both to "cushion" it sufficiently to ensure its survival in the face of that exposure and to pay for the massive litigation costs it would face defending claims in the tort system. Ultimately, Fibreboard was forced to yield to the insurers' position as to such a "back-up" agreement — but only, as the District Court found, as the price for obtaining the class's entry into the Global Settlement. CA 330a.**

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* "Trilateral" because the parties would be Fibreboard, Continental and Pacific.

** The amount of this "back-up" Trilateral Agreement was ultimately set at $2 billion, reflecting the $1.525 billion the insurers were to pay to the "futures" class under the Global Settlement plus an additional amount necessary to resolve certain still-unsettled present asbestos claims that, under a Global Settlement regime, were to be resolved separately by the insurers. CA 354a-55a, 361a-62a.

This Trilateral Agreement was conditional on issuance of a final judgment that, in pertinent part: (a) certified a virtually *identical non-opt-out futures class of asbestos claimants*; and (b) declared that the Trilateral Agreement represented a fair settlement of the coverage dispute and cut off any rights class members might have under the insurance policies. Br. 4 n.6. That judgment was issued in a companion case below (*Continental Cas. Co. v. Rudd*) — a judgment that was supported both by

III. The Global Settlement and subsequent procedural history.

The Global Settlement resolves the risks that the coverage disputes posed to the class, to Fibreboard and to the insurers, and it does so on terms that not even petitioners claim are unfair to the class. It transforms the disputed insurance coverage into over $1.5 billion cash and transfers it to independent Trustees for the class's benefit, for distribution to class members in accordance with procedures that will minimize delays and will maximize the amount of money class members actually receive, by capping claimants' attorney's fees at 25% (well below the 33-40% norm) and by dramatically reducing the costs of defense. CA 49a, 362a-366a.

Equally important, however, is what the Global Settlement does *not* do: it does *not* set individual class members' recoveries or deprive individual class members of recourse to the tort system. CA 58a & nn.7-8. Individual recoveries will instead be set on an individual basis as the claims arise. Individual class members may resolve their claims consensually with the Trust through *non*-binding negotiation, mediation or arbitration — a process in which the Trust is required to take into account all individual characteristics of the claim at issue. And if individuals are dissatisfied with their proposed recovery for any reason, they have the absolute right to exit into the tort system to litigate their claims, with the Trust substituting for Fibreboard as the defendant. CA 50a, 346a.

After the District Court preliminarily approved the Global Settlement in July 1994, the settling parties implemented, at a cost of more than $18 million, the most comprehensive notice campaign ever conducted in a class action. CA 462a. This campaign included: (i) over 200 national television advertisements

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petitioners and by the same judge who so vehemently dissented from the approval of the Global Settlement as illegitimately certifying the same non-opt-out class. Certiorari was not sought as to that judgment. As detailed at pages 19-21 below, petitioners' assertions that the Trilateral Agreement "moot[s]" the risk to the class (Br. 2 n.3) are flatly contrary to the record.

and almost 3,000 additional television spots in 72 of the media markets most likely to contain class members, advertisements which in combination were estimated to have reached 94.2% of the nation's television households an average of 5 times each; (ii) 286 newspaper advertisements in 151 markets, and 171 follow-up ads in the 72 "targeted" markets; (iii) additional newspaper ads in 21 foreign countries; (iv) further advertisements in other publications with an aggregate circulation of well over 100 million; and (v) advertisements in 25 national and international labor publications. CA 460a-62a. Beyond this, 1.4 million notice packages were then sent out, including to 175,000 present and former employees of 209 companies where significant numbers of asbestos claims had arisen and to 2,470 plaintiffs' lawyers who had previously represented asbestos plaintiffs. CA 460a, 463a.

Following this unprecedented notice campaign and broad rights of discovery exercised by petitioners, the District Court conducted an eight-day live fairness hearing featuring testimony by 18 witnesses, hundreds of exhibits and full procedural rights afforded to petitioners. This hearing included not only detailed testimony on the negotiations leading up to the settlement, but also extensive expert testimony as to the potential outcomes of the coverage disputes, projections of the number of future asbestos claims against Fibreboard, the relative benefits to the class of the Global Settlement as compared with the alternatives (including the Trilateral Agreement) and ethical issues raised by petitioners. CA 272a-76a, 356a-60a, 392a-96a. The District Court also received a detailed report from a Guardian Ad Litem (Professor Eric Green) it had appointed to conduct an independent review of the Settlement from the standpoint of the class, setting forth the guardian's determinations that that Settlement was fair and superior to all alternatives and recommending that it be approved. CA 431a-42a. Despite the provision of notice to millions of persons (and to thousands of asbestos plaintiffs' lawyers), fewer than 30 objections to the Settlement were received. CA 348a.

In July 1995, the District Court issued comprehensive findings of fact, conclusions of law and an extensive opinion approving the Global Settlement, finding that the Global Settlement is fair to the class, and indeed represents a "far" superior outcome for the class than any practical alternative, including the "back-up" Trilateral Agreement. CA 241a-242a, 366a-367a. The Fifth Circuit affirmed the District Court's findings, conclusions and opinion, with one judge dissenting. In an extensive opinion, the court rejected each of the objections petitioners had raised, including their claim that the District Court's judgment was at odds with the Third Circuit's decision in *Amchem* (then named *Georgine*). Recounting in detail the "stark contrast" between this case and *Amchem*, the Fifth Circuit held that the class here was valid despite its "like[ly] agreement" — correctly anticipating this Court's eventual holding — that the *Amchem* class was not. CA 57a-58a & n.8.

After this Court issued its opinion in *Amchem*, it remanded this case to the Fifth Circuit for further consideration in light of *Amchem*. The Fifth Circuit ordered extensive briefing on the issue, and again heard full oral argument. Thereafter, it reaffirmed its prior findings and conclusion regarding the "controlling differences between this case and *Amchem*," the same judge once again dissenting. CA 2a.

IV. Petitioners' distortion of the uncontested record.

Petitioners, however, completely ignore the findings of the courts below, and instead portray this case in a manner diametrically opposed to those findings. Without even making an effort to document their claims in the record, petitioners simply proclaim that the insurance available to the class was "unlimited" and not subject to serious challenge (Br. 2, 24-26); that the insurers and Fibreboard nonetheless effectively bribed "several cooperative" plaintiffs' lawyers into agreeing to a mandatory class settlement that the class had no reason to enter (Br. 3, 6, 41, 44); and that the "significant limitations" the Global Settlement supposedly places on the class are thus "entirely gratuitous." Br. 8-9 & n.9. This highly inaccurate

presentation — which is apparently intended to obscure the fact that, under petitioners' version of the law, there was simply *no way* for the class to protect itself against the risk of the coverage disputes — was roundly rejected by both courts below.

1. *The class did not have "unlimited" insurance.* — The premise of petitioners' entire brief — the blithe assertion that the class had access to "an *unlimited* insurance fund" prior to the Global Settlement (Br. 2 (emphasis in original)) — is patently false. Indeed, the assertion has been invented for the first time in this Court. Before the Fifth Circuit, petitioners expressly conceded that "the overwhelming consensus of all informed counsel" is that the now supposedly "unlimited" insurance fund was in fact subject to very serious risk, reciting at length the evidentiary record that the risk that Fibreboard could lose the coverage dispute was "significant," "dire" and "grav[e]." Fib. App. 8a-9a.*

The findings of the courts below could not be clearer. The District Court assessed Fibreboard's prospects of prevailing in the coverage case appeal, viewed as of the time both of the agreement-in-principle and of the fairness hearing.** Based on

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* This concession came in an *amicus* brief that petitioners filed in the Fifth Circuit in the companion *Rudd* action supporting the District Court's judgment approving the "back-up" Trilateral Agreement. As discussed below, that Agreement provides far *less* insurance funds to the class. *See* pp. 19-21, *infra*. If petitioners in fact believed their own rhetoric before this Court that the insurance was "unlimited," they obviously could never have supported the Trilateral Agreement.

** By the time of the fairness hearing, the following developments in the coverage case had occurred: (1) the appellate court, in light of the Global Settlement, had severed out and reserved decision on three issues described above — the Continental "per-occurrence" and "double anchor" issues and the "missing Pacific policy" issue — that were not germane to the other parties to the appeal (which was a consolidated proceeding involving dozens of other insureds and insurers); (2) the appellate court had proceeded to decision upon and largely affirmed the trial court's rulings in favor of Fibreboard's position on the "trigger" and "scope" issues, which *were* presented by other parties to the consolidated appeal; and (3) the California Supreme Court had granted review of this decision on

the evidence before it, including expert testimony of retired Justice Marcus Kaufman of the California Supreme Court and Professor George Priest of Yale Law School — evidence that petitioners did not contest or challenge in any way — the District Court found that there was a "significant risk" that Fibreboard's trial court victory would be substantially or entirely undone on appeal, either by the appellate court or the California Supreme Court. CA 231a, 272a-76a, 357a. The Fifth Circuit affirmed this finding in all respects. CA 75a.*

Moreover, the District Court further found — in findings that petitioners likewise do not contest — that this already "significant risk" to Fibreboard's claimed coverage was compounded by the assignment settlement dispute. Indeed, by the time of the fairness hearing, the California Court of Appeal had reversed the *Andrus* trial court, ruling that Fibreboard in fact had *no* right under the Continental policy to enter into "assignment" settlements. CA 379a; JA 485a. As the District Court found, "no one disputes" that there was accordingly now a further "significant risk" that Fibreboard "might lose its insurance coverage" as a result of this ruling even if it otherwise prevailed in the coverage case itself. CA 52a, 231a.

2. *Resolution of the coverage dispute required a unitary class settlement.* — Similarly baseless is petitioners' pronouncement that there was no "need for the personal injury claims [of the class] to be 'bundled' with [an] insurance settlement," and that the class's entry into a mandatory class settlement was instead procured by "negotiating strategies" of

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the "trigger" and "scope" issues on a "grant and hold" basis pending its decision of similar issues in another case. CA 271a-72a.

* After the District Court's determination, the intermediate appellate court, acting on remand from the California Supreme Court, reaffirmed its earlier decision on the "trigger" and "scope" issues, and the Supreme Court denied review. *Armstrong World Indus. v. Aetna Cas. & Sur. Co.*, 52 Cal. Rptr.2d 690 (Cal. App. 1996). The remaining issues — including the Continental "per-occurrence" and "double anchor" issues and the "missing" Pacific policy issue — are still being held in abeyance by the appellate court.

Fibreboard and the insurers that succeeded in buying off supposedly compliant class counsel. Br. 41. The District Court categorically rejected these assertions, summarizing the record as demonstrating that the "significant risk[s]" to the class posed by the coverage dispute could be resolved "*only*" through a non-opt-out, unitary settlement encompassing all claims: that "[r]esolution of the insurance dispute required a unitary settlement in a proceeding in which *all* claims were compromised" and that "[t]he need to protect Class members' common interests in the insurance proceeds subject to the coverage dispute demand[ed] a unitary resolution." CA 231a-232a, 241a, 490a (emphasis added).

This finding is amply borne out by the parties' multiple unsuccessful efforts at a piecemeal resolution during the course of a 14-year coverage dispute, notwithstanding intense pressure to achieve a resolution. *See* pp. 7-8, *supra*. As the record shows, the unworkability of a piecemeal solution was a product not of "negotiating strategies," but of what the courts below found were the economic realities that each party faced.

From *Fibreboard's* perspective, its coverage claims were the only thing that stood between it and insolvency: it believed it would remain a viable company *if* it prevailed in the coverage disputes; it would be immediately bankrupt if it lost. CA 78a-79a, 357a-358a. Accordingly, it was not about to settle those disputes on terms that would still leave it facing likely bankruptcy. Thus, from Fibreboard's standpoint, any settlement of those disputes either had to (a) be so financially cushioned that there was no real risk that future asbestos liabilities and defense costs would place its corporate existence in jeopardy, or (b) involve the asbestos plaintiffs, thereby resolving its overall future liability. CA 330a, 374a-75a.

The *insurers*, for their part, were certainly willing to put enormous funds on the table to rid themselves of the potential no-limit exposure claimed by Fibreboard. But they were not willing to forgo their substantial arguments disputing coverage — on which they had a significant chance of escaping any liability at all — by giving Fibreboard the "cushion" necessary to

place its survival beyond question. CA 330a. Nor were they in a position to settle the coverage disputes and pay the enormous sums thereby entailed and still be left with unquantifiable potential additional liabilities to opt-out plaintiffs. CA 43a-44a, 306a-07a, 378a.* Contrary to petitioners' insinuations, this was not an arbitrary "negotiating strateg[y]" by the insurers. As noted above, the global "assignment" settlement discussions between Fibreboard and the plaintiffs — in which the insurers had *not* participated — had foundered precisely because of an inability to devise a workable means of dealing with opt-outs. *See* p. 8, *supra*. And indeed, the prospect of opt-outs was even more unworkable at the time of the Global Settlement negotiations, since the timing of the coverage case appeal before the California court would have entailed giving class members the right to opt out of a global settlement *after* the outcome of the appeal was known, and hence a one-way option on the settlement terms. CA 44a, 306a-07a. Thus, from the insurers' standpoint, any settlement of the coverage disputes had to involve *all* the asbestos plaintiffs.

The situation facing the *class* was thus simple. The insurers and Fibreboard had shown over the course of 14 years of litigation that they were unable to reach a settlement of the coverage disputes without involving the asbestos plaintiffs. For that very reason, however, the class had enormous negotiating leverage over both the insurers and Fibreboard, each of which faced catastrophic risk if the coverage disputes continued. Those parties were consequently offering the class over $1.5 billion for a global settlement, an amount that was indisputably a fair resolution of their claims. CA 98a, 359a-361a. The class could either secure that enormous insurance fund, or run the significant risk of losing the prospect of recovery

* Although the amount of the settlement was obviously of importance to the insurers, the indispensable element from a corporate reporting point of view was to remove uncertainty and quantify their Fibreboard exposure with finality — something that could not be achieved if opt-outs were allowed. JA 213a.

entirely by pressing forward with a quixotic pursuit of what remained of Fibreboard's non-insurance assets.

3. *The Trilateral Agreement does not solve the class's problems.* — Nor, contrary to petitioners' claims, does the Trilateral Agreement show that Fibreboard and the insurers were able to settle the coverage disputes "independently" and that "[t]he Global Settlement was not necessary to overcome [the] stumbling block[s]" to such an independent settlement. Br. 4, 9 n.9. To the contrary, as detailed above, the District Court found and the record is uncontroverted that Fibreboard acceded to the Trilateral Agreement *only because* it was the price of obtaining a unitary resolution through the Global Settlement and *only because* it was merely a contingent "back-up" to that unitary resolution. *See* p. 11, *supra*.* The record thus totally belies petitioners' version of events.

Likewise, petitioners badly misrepresent the record in portraying the Trilateral Agreement as having "mooted" the risk of the coverage dispute to class members by providing Fibreboard with enough money "to resolve all of" its liabilities to the class and to "survive indefinitely, perhaps forever." Br. 4 n.6, 9. As the District Court found, Fibreboard would have to use the Trilateral money to pay a host of claims and

* Petitioners' sole effort to deal with this fact — that, as the District Court found, the coverage dispute could be settled "only" through a unitary resolution involving the class (CA 241a) — is a mischaracterization of the testimony of Fibreboard's counsel. They quote counsel as having stated that, at one point, Fibreboard would have settled directly with the insurers (without the plaintiffs' participation) for $3.2 billion, an amount less than the insurers ultimately agreed to pay under the Global Settlement to resolve future claims and to separately resolve present claims. Br. 9 n.9. What petitioners omit is that Fibreboard's $3.2 billion number was *before* developments (notably, the July-August 1993 renegotiation of "assignment" settlements of pending claims described above) that *increased* the value of both present claims and the ultimate future global settlement. Class Br. 10-11. Accordingly, Fibreboard's counsel went on to testify that — when, in response to these developments, the insurers raised their offer to $3.2 billion — there was "no way" that Fibreboard would have agreed to that number to settle without the plaintiffs' participation. JA 111a-12a.

other liabilities *in addition* to those advanced by class members, including (as noted above) unsettled pending asbestos claims not within the class and the enormous defense expenditures entailed in litigation. *See* p. 11n.**, *supra*; CA 361a-362a, 354a-355a. As a result, the findings below are clear that the Trilateral Agreement is "far" inferior to the Global Settlement from the class's standpoint and does *not* provide enough money to guarantee payment, full or partial, to class members. CA 73a, 240a, 358a-359a, 361a-366a.

Thus, the record is *uncontested* that the class would in the aggregate receive "at least" several hundred million dollars *less* under the Trilateral than under the Global Settlement, and a significant number of class members could well receive *nothing* at all. CA 358a-359a, 361a-362a. The expert testimony at the fairness hearing laid this out in detail: the class would receive $234-477 million *less* under the Trilateral than under the Global Settlement. 5th Cir. JA 114 at 67; 5th Cir. JA 124; 5th Cir. JA 7 at 2054-57. As a consequence, that testimony continued — whereas under the Global Settlement it was more probable than not that *all* future claimants would receive fair and appropriate compensation (CA 359a) — under the Trilateral *41-50%* of the class, between *104,000* and *127,000* asbestos claimants, would likely be left *unpaid*. 5th Cir. JA 116-18; 5th Cir. JA 7 at 2058-60.* Indeed, as the Fifth Circuit put it, under the Trilateral, "Fibreboard would be unable to pay all the valid claims against it within *five to nine years*." CA 73a (emphasis added).**

* This expert testimony went totally uncontradicted by any evidentiary presentation by petitioners. And although the District Court was not prepared to adopt the precise numbers set forth by this testimony, it did agree that "the amount that would actually reach class members under the Trilateral Settlement would be at least hundreds of millions of dollars less than under the Global Settlement" and that "there is a significant risk that the Trilateral Settlement . . . would leave a 'late-comer' component of the [class] without compensation." CA 359a, 362a.

** Petitioners' reliance on snippets of Fibreboard statements about its prospects under the Trilateral (Br. 9) omits the facts: (i) that the District Court found on the complete record that it "c[ould] *not* adopt" the optimism expressed in those statements (although it credited that optimism as "genuine"); (ii) that Fibreboard *itself* went on to acknowledge that there was a "substantial risk" that the Trilateral money would *not* be sufficient to allow it to pay all its liabilities to the class; and (iii) that Fibreboard further made clear that the Trilateral money would be sufficient to allow it to survive only if it succeeded in reducing class members' recoveries to *one-half of current levels*. CA 358a-59a, 362a. Thus, even on these Fibreboard statements — whose optimism the District Court could not adopt in any event — class members would receive *far* less money under the Trilateral Agreement than under the Global Settlement, and there would be a substantial risk that many would receive nothing at all.

4. *Petitioners' criticism of particular terms of the Global Settlement is unfounded.* — Finally, petitioners' sniping about supposed "significant limitations" that the Global Settlement places on plaintiffs' recoveries is belied both by the record and by petitioners' own tacit concession of the Settlement's *overall* fairness to the class. For example, petitioners' repeated complaint that the Global Settlement does not deprive Fibreboard of its non-insurance assets ignores the fact that, as set forth above, Continental had contractually bound itself *prior* to the Global Settlement that insurance proceeds would fund the entire cost of any Global Settlement. CA 327a, 375a. It also ignores the fact that these were *Fibreboard's* insurance policies: settlement of liability covered by insurance is *ordinarily* paid by the insurer, not by the defendant itself. Similarly, petitioners' invocation of a series of hypothetical outer limits that the Global Settlement places on disproportionate windfall awards (Br. 8) ignores the District Court's finding that the limits reflect tort-system realities against Fibreboard and thus should have at most a minimal impact in practice on class members' individual recoveries. App. 372a-374a; *see* Class Br. 16-17.

More fundamentally, however, these complaints about isolated terms of the Settlement miss the forest for the trees. While in an ideal world it might have been desirable from the class's standpoint to have Fibreboard's $225-250 million in equity added to the Settlement (or for that matter, $225-250

million more from the insurers), or to obtain enough money to guarantee payment of hypothetical wild-card awards to all class members, this was a *settlement* in which each of the parties had to make concessions to achieve a resolution that avoided the very major litigation risks that otherwise confronted *each* of them. The important questions are thus whether the $1.535 billion the class was able to extract is fair and reasonable in light of the risks posed by the coverage disputes and the anticipated level of future claims, and whether receipt of that fund and resolution of those risks warrant the outer limits on recovery discussed above. Petitioners do not — and cannot — contest the lower courts' affirmative factual findings on either point.

Summary Of Argument

Given the undisputed fairness of the Global Settlement and the seriously adverse consequences of reversal to the class, petitioners bear a heavy burden indeed in this case. They must demonstrate that the Global Settlement is not provided for by the Federal Rules or is affirmatively precluded by something in the federal statutes or Constitution.

No such demonstration has been made. Petitioners are long on ringing proclamations of supposed rigid rules of law: Rule 23(b)(1)(B) class actions may *never* be certified unless there is a "limited fund"; bankruptcy was the *only* legally permissible option for the class; non-opt-out classes are *per se* unconstitutional where *in personam* monetary claims are involved; and adequate notice may *never* be given to future claimants. But they are virtually silent on the precedential basis for these supposed hard and fast rules. As detailed below, that is because the "rules" do not exist and because the certification of the class was completely proper under settled principles of law.

1. Petitioners do *not* dispute that non-opt-out class certification was authorized here by the plain language of Rule 23(b)(1)(B). Instead, their principal contention that certification of the class transgressed Rule 23(b) is predicated entirely on the notion that the Rule somehow contains an unstated "limited fund" requirement. This supposed requirement, however, appears nowhere (a) in the language of the Rule; (b) in the Rule's Advisory Committee Notes, which to the contrary specifically state that the Rule is to operate "in the absence of a fund either present or potential"; or (c) in any decided case. *See* Point I.A, *infra*.

2. Nor is there any basis for petitioners' follow-on claim that the Bankruptcy Code precludes the application of Rule 23(b)(1)(B)'s plain language in this case. As of August 1993, when the Global Settlement was reached, class members could *not* put Fibreboard into bankruptcy, at least without first requiring it to litigate and *lose* the coverage dispute. Petitioners must therefore point to *something* in the Bankruptcy Code stating that it bars the normally available procedures of Rule 23(b)(1)(B) — particularly in circumstances where class members could *not* invoke that Code as an alternative. Unsurprisingly, petitioners have not done so. *See* Point I.B, *infra*.

3. Equally without merit is petitioners' argument that the operation of Rule 23(b)(1)(B)'s plain language in this case violates Due Process and the Rules Enabling Act. Petitioners' proposed *per se* rule that would categorically foreclose the federal courts from achieving a unitary resolution whenever the class asserts *in personam* claims — no matter how draconian the consequences to the class — is at odds with this Court's precedents and hundreds of years of settled practice. Quite the contrary, these authorities recognize that there will, indeed, be situations in which the class needs such a resolution no matter whether its claims might be deemed *in personam* or *in rem*, and establish that the permissibility of a unitary resolution turns instead on whether it is necessary to protect the class. This is precisely the approach adopted by Rule 23(b)(1)(B)'s plain language, and there is no basis to hold that Rule unconstitutional or in violation of the Rules Enabling Act. *See* Point II, *infra*.

4. Finally, petitioners' alleged rule that adequate notice cannot be given to future claimants would effectively bar any class

actions embracing future claims and flies in the face of all precedent. This Court's seminal decision in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), definitively rejected this argument, as have innumerable cases thereafter approving class actions involving future schoolchildren, employees, prisoners, housing tenants and others. What these cases recognize instead is that there are numerous situations in which future claimants benefit from a class resolution designed to protect the rights they will eventually develop, and that due process thus requires only the best notice "reasonably possible or practicable" where future claimants are involved (*Mullane*, 339 U.S. at 317). *See* Point III, *infra*.*

Argument

POINT I

THE CLASS WAS PROPERLY CERTIFIED AS A MANDATORY CLASS UNDER RULE 23(b)(1)(B).

A. The plain language of Rule 23(b)(1)(B) requires a mandatory class on the facts of this case.

Petitioners' primary objection to mandatory class certification in this case is that the class cannot be certified under Rule 23(b)(1)(B) because there was no "limited fund" in this case. Br. 23-31. There is no merit to this argument.

1. This Court has repeatedly made clear that the Federal Rules are to be interpreted in accordance with the "plain meaning" of their language. *E.g*, *Business Guides v. Chromatic Comm. Enterprises*, 498 U.S. 533, 540-41 (1991) ("As with a statute, [the] inquiry is complete if . . . the text of the Rule [is] clear and unambiguous."); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 391 (1990); *Pavelic & LeFlore v. Marvel Enter-*

* Petitioners' arguments that the class does not meet the requirements of Rule 23(a) and that this action violates Article III are addressed in the brief filed by the Plaintiff Class.

tainment Group, 493 U.S. 120, 123 (1989). Rule 23(b)(1)(B) calls for certification of a mandatory class where:

> (1) the prosecution of separate actions would create a risk of
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair their ability to protect their interests.

In other words, individuals cannot opt out of a class where their doing so would risk significant prejudice to their fellow class members' claims: where allowing individual opt-outs would "create a risk" that other class members would "as a practical matter" suffer a "substantial[ ] impair[ment] . . . [of] their ability to protect their interests."

As the courts below found and as even the dissent below conceded (CA 73a, 132a-33a, 230a-33a), this case falls squarely within the Rule's plain language. As set forth above, failure by the class to file and maintain a class action to resolve the coverage disputes on a unitary basis — allowing class members instead to prosecute their claims separately — would have put class members to the "significant risk[s]" that Fibreboard would lose its claimed insurance as a result of the coverage disputes and that all (or virtually all) class members would be able to recover nothing on their claims. *See* pp. 15-19, *supra*; CA 76a, 230a-34a. Indeed, any separate action by any class member could have *itself* resulted in an adjudication that the insurers owed no coverage to Fibreboard: if a class member sought to have Fibreboard's liability paid by the insurers,* the insurers would have defended on the ground that they owed no coverage to Fibreboard; and any such action would create the "significant risk" of an adjudication in favor of the insurers, an adjudication that "as a practical matter" would

* The Continental policy, for example, expressly permitted tort plaintiffs to seek to enforce directly against Continental any judgment against Fibreboard. JA 411a.

clearly prejudice the class. *See* Advisory Committee Notes, 39 F.R.D. at 100-02 (Rule 23(b)(1)(B) certification appropriate where an individual adjudication — although "nominally affecting only one [class member]" and "not technically concluding the other members" — "might" nonetheless "do so as a practical matter" or have "practical effects" on the rest of the class).

Separate actions in this case, as the District Court found, thus presented a "risk" that class members would "as a practical matter" suffer a "substantial[ ] impair[ment] . . . [of] their ability to protect their interests" — by potentially denying them their only possible source of recovery for reasons unrelated to the merits of their claims against Fibreboard. CA 233a, 490a-91a.* As the Fifth Circuit put it, "[n]o one has contested th[is] finding, . . . probably because it is incontestable." CA 2a.

Contrary to the strawman set up by petitioners, this does *not* approve class certification on the basis of a "settlement fund" that is "limited only in the sense that literally every settlement is limited," thereby supposedly rendering "*every* settlement of class claims for money damages" eligible for class treatment under Rule 23(b)(1)(B). Br. 28 (emphasis in original). Rather, it holds that — as the Rule's language directs — 23(b)(1)(B) certification is appropriate where, absent a unitary resolution, the class's only source of recovery would potentially be lost for reasons *unrelated* to the merits of individual class members' underlying tort claims: for example, where (as here) the sole

* As set forth above, this risk exists as well under the Trilateral: the record demonstrates that, under that Agreement, the class as a whole will recover at least hundreds of millions of dollars less than under the Global Settlement and many class members will recover nothing at all. *See* pp. 19-21, *supra*. In any event, it would be inappropriate to use the Trilateral Agreement as the basis for denying class certification with respect to the Global Settlement. As shown above, the Trilateral Agreement would not have been agreed upon *but for* the parties' agreement to the Global Settlement. *See* p. 11, *supra*. To contend that the subsequent creation of this "far" inferior, back-up agreement precludes approval of the far *superior* Global Settlement would create a rule of law under which parties would be deterred from devising such alternate contingency arrangements — lest in so doing they invalidate what they believe to be the best resolution for all of them.

source of meaningful recovery for the class lies in a defendant's claimed insurance, but where that insurance is subject to a genuine dispute that the defendant has a significant chance of losing unless a unitary resolution is achieved. CA 233a.* As the District Court explained in dismissing petitioners' similar hyperbole below, this holding thus does *not* support the certification of a mandatory class "in the typical case where a class action is settled with a defendant's own funds, or with insurance funds that are not the subject of genuine and vigorous dispute" — in such a case, "if the settlement failed because [opt outs] were permitted, the defendant would retain the settlement funds (or the insurance coverage) and there might not be the 'impair[ment]' to class members' 'ability to protect their interests' required for mandatory class certification" by the language of Rule 23(b)(1)(B). CA 233a, 490a-91a.

2. Notwithstanding this Court's admonition that the Rule is to be given its "plain meaning," petitioners — beyond their patently false mantra that Fibreboard's insurance was "unlimited" and not subject to serious challenge — never address the Rule's language or dispute that a unitary resolution is called for here by that language. Instead, their entire argument is premised on the notion that the Rule somehow contains an *extra*-textual requirement that the class be asserting *in rem* claims against a "preexist[ing]" "limited fund." *E.g.*, Br. 27.

This supposed "limited fund" requirement, for which no authority is cited, is made up out of whole cloth.** It appears nowhere in the language of the Rule. It appears nowhere in the

* In a more candid moment, petitioners' counsel acknowledged exactly this, stating that the decision below does not "offer significant precedent for future . . . class actions" because it is "only precedent for a class action in the event there is a dispute between an insurance company and an insured where the insured would go insolvent otherwise. That won't occur very often." *Business Insurance*, August 5, 1996, at 38.

** Petitioners make the curious assertion that it is "undisputed" that Rule 23(b)(1)(B) requires a "limited fund." Br. 23 n.20. We cannot imagine where this supposed concession comes from. Petitioners cite only the dissent below — in which, as noted above, the dissenting judge *conceded*

Advisory Committee Notes — which, while alluding to a 'limited fund' situation as an *example* of the circumstances in which the Rule would operate, then immediately go on to state specifically that the Rule is to operate "in the *absence of a fund either present or potential*"; and which specifically cite as examples of cases falling *within* the Rule two of this Court's precedents upholding mandatory class resolutions *not* involving claims against a "limited fund." *See* 39 F.R.D. at 101 (emphasis added; citing *Smith v. Swormstedt* and *Supreme Tribe of Ben-Hur*, discussed more fully at page 36 below). And the supposed "limited fund" requirement likewise appears nowhere in the history underlying the Rule. As detailed below, this Court's precedents and settled common law practice instead employed precisely the approach subsequently incorporated in the Rule's language, making the propriety of mandatory class certification turn on whether there is a legitimate need for a unitary class resolution to protect the class rather than on whether the class is asserting *in rem* claims against a "limited fund" — and indeed making clear that the requisite need *does* exist where (as here) such a resolution is necessary to secure the entire class's source of recovery. *See* pp. 35-40, *infra*; *see also White v. National Football League*, 822 F. Supp. 1389, 1411 (D. Minn. 1993) ("[C]lasses under Rule 23(b)(1) may also be certified in cases involving claims for money damages in which no 'limited fund' exists.").

Nor have petitioners offered any reason for engrafting a "limited fund" requirement onto the Rule's plain language. As the facts of this case amply demonstrate, circumstances do

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that mandatory certification was appropriate as a matter of the Rule itself, and argued instead only that such certification violated constitutional and statutory requirements. CA 132a-133a. Moreover, petitioners' references to "limited fund" arguments that respondents did make in the courts below (Br. 26) carefully ignore respondents' 13-page principal argument below — that the Rule does *not* require a "limited fund" — and instead pretend that respondents' brief 2-page *alternative* contention that a "limited fund" in any event does exist here constituted a supposed concession that a "limited fund" is necessary. *Compare* Brief of Appellees, No. 95-40635 (5th Cir.), at 80-93 *with id.* at 93-95.

arise where class members would be profoundly prejudiced absent a unitary resolution whether or not the case involves *in rem* claims against a "preexist[ing]" "limited fund." Indeed, class members here were, if anything, *more* in need of a unitary resolution than are petitioners' hypothetical "limited fund" claimants: whereas a "preexist[ing]" "limited fund" would still exist absent a unitary resolution (albeit it might be distributed inequitably), here class members would otherwise face a severe risk that they would have no source of compensation *at all*. And as for petitioners' "sky is falling" predictions of abuse of mandatory class actions, Rule 23(b)(1)(B) and the underlying history delineate specific requirements for cases in which the need of class members is such that unitary resolutions are permissible. The appropriate way to prevent petitioners' exaggerated auguries is to require scrupulous adherence to the language of the Rule, not to adopt petitioners' approach of rewriting the Rule to declare certain types of cases categorically unfit for unitary class treatment, regardless of the potential consequences to the class in any individual case.

Accordingly, to affirm the decision below, this Court need not go so far as to say — as did the Fifth Circuit (and as has the Second Circuit as well) — that a tort defendant that lacks sufficient assets to pay all likely claims against it may be a "limited fund." CA 74a; *see also In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992).* It need only hold that in this case the significant risk posed by Fibreboard's coverage dispute to class members' only source of recovery foursquare satisfies the requirements of the plain language of the Rule — which petitioners do not dispute it does.

An amicus, the Trial Lawyers for Public Justice, also raises two further objections to 23(b)(1)(B) certification nowhere hinted at in the language of the Rule. *First*, the Trial Lawyers contend that this action cannot be certified under the Rule

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* Contriving yet another strawman, petitioners assert that the Fifth Circuit deemed Fibreboard's *non*-insurance assets — without its claimed insurance — as the "limited fund." Br. 24. This caricature is belied by any fair reading of the Fifth Circuit's opinion. CA 73a-74a.

because Fibreboard has not contributed its entire equity to the *settlement* of the action. TLPJ Br. 11. As the District Court put it, however, there is "no authority or reason" why a 23(b)(1)(B) class action, unlike any other action, may be settled only if "all of the defendant's resources are included within the settlement" (CA 233a-34a) — a rule of law that would as a practical matter force all contested 23(b)(1)(B) class actions involving monetary claims to be litigated to conclusion, since no defendant would settle on terms that leave it with no assets at all. Instead, as the District Court recognized (*id.*), the question raised where a mandatory class settlement does not include all of the defendant's assets is whether the settlement is *fair* — and neither the Trial Lawyers nor anyone else contends that the Global Settlement is not. *Second*, the Trial Lawyers insist that Rule 23(b)(1)(B) is transgressed because the class does not include *all* "tort claimants and creditors" against Fibreboard, including those whose claims have nothing to do with asbestos. TLPJ Br. 9. The Trial Lawyers, however, point to nothing in the Rule requiring that *all* potential creditors of whatever stripe be included in a 23(b)(1)(B) class. In particular, moreover, this action was brought to resolve Fibreboard's *coverage* disputes and class members' interests in the *insurance* policies — not to address claims against the company that fell outside of its claimed coverage. The class thus includes *only* those persons whose claims are arguably covered by the disputed insurance, and there was no need to include *other* creditors.*

* With the exception of "present" asbestos claimants, the class thus includes all persons who could be identified as having potential claims against Fibreboard that would arguably have triggered coverage under the policies. The Trial Lawyers' speculation that there are other "tort claimants" against Fibreboard with claims against "the insurance policies" (TLPJ Br. 9) fails to identify who those claimants might be or to explain how they might exist yet somehow be unknown to the parties 40 years after the expiration of the policies. Finally, although the claims of "present" asbestos claimants are settled separately and are not included within the class, no one contests the District Court's finding that these claimants were not treated more favorably than the class. CA 408a; *see* Class Br. 11, 41. Accordingly, the sole authority cited by the Trial Lawyers does not avail them: it stresses that "under-inclusiveness" is not "necessarily fatal to a class created under 23(b)(1)(B)," and holds only that a class may not be defined so as to "single out" class members "for special and possibly disadvantageous treatment." *In re School Asbestos Litig.*, 789 F.2d 996, 1006-07 (3d Cir. 1986).

B. Rule 23(b)(1)(B) certification in this case did not violate the Bankruptcy Code.

Despite their contention that application of Rule 23(b)(1)(B)'s plain language here illegitimately "circumvented" the Bankruptcy Code (Br. 37) — and that certification of the class in this case would "sanction[ ]" the Rule as "a general bankruptcy substitute" (Br. 30) — petitioners do not quarrel with one central fact: class members could *not* have put Fibreboard into bankruptcy in August 1993, when the Global Settlement was reached. CA 78a, 376a. Fibreboard was meeting its obligations as they came due at that time, and class members' contingent, future claims could not force it into bankruptcy. *See* 11 U.S.C. § 303(b)(1); CA 79a, 376a. Bankruptcy proceedings could instead have been reached only by forcing Fibreboard to litigate for, and *lose*, its claimed insurance, the only source of real recovery for the class. CA 76a-79a.* Such proceedings, as the Fifth Circuit put it, thus "would be too late for [class members]," who would get virtually nothing in bankruptcy if the insurance were lost. CA 78a-79a. Petitioners' suggestion, then, is that the class was required — *required* — to spurn $1.535 billion from the insurers and Fibreboard, and force Fibreboard to roll the dice in the coverage litigation: secure in the knowledge that, though the coverage might be lost, a bankruptcy proceeding in which class members would receive pennies on the dollar, if anything, would be waiting to "protect" them.

* Although Fibreboard had outstanding settlement obligations from prior cases far in excess of its non-insurance assets, those obligations — by virtue, in large part, of the assignment program described above — would not come due until *after* a resolution of the coverage litigation. CA 376a. As a result, only a loss of the coverage litigation would have rendered it insolvent immediately.

It is incumbent upon petitioners to point to *something* in the Bankruptcy Code that actually mandates this absurd course: some provision that dictates that the class had to await "catastrophe" in the coverage litigation (App. 77a); that suspends the normally available procedures of Rule 23(b)(1)(B) in the interim; and that does so even though the class could not actually invoke the Code's provisions as an alternative, but instead might only be able to do so at some point in the indeterminate future. Unsurprisingly, petitioners have identified no such provision. To the contrary, the only Code section that even remotely addresses this question expressly permits the district courts to sanction a resolution outside of bankruptcy where "the interests of creditors and the debtor would be better served" thereby. 11 U.S.C. § 305(a)(1).* (Indeed, the legislative history makes clear that this provision is designed to guard against just what is occurring here: to prevent a "few recalcitrant creditors" from holding up a fair and superior private resolution worked out outside of bankruptcy in order to "extract full payment" for themselves. H.R. No. 95-595, 95th Cong., 2d Sess., at 325 (1978).) And this provision has in fact been invoked in numerous cases to permit private arrangements between creditors and a debtor to proceed outside of bankruptcy.** If the Code thus does not prohibit private arrangements outside of bankruptcy even in certain situations where the creditors actually could have put the debtor into a bankruptcy proceeding, it *a fortiori* enacts no such prohibition

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* Petitioners badly distort the Fifth Circuit's opinion in contending that it relied on § 305(a)(1) as "a grant of authority" to "ignore" restrictions on its powers. Br. 38. What the Fifth Circuit actually — and quite properly — held was that this section refuted petitioners' claim that, in the circumstances of this case, the Bankruptcy Code divested the court of the *authority it otherwise possessed under Rule 23(b)(1)(B) and traditional practice*. CA 78a. One look at the plain language of § 305(a)(1) shows that the Fifth Circuit was clearly correct in this regard.

** *See, e.g., In re Colonial Ford*, 24 B.R. 1014 (D. Utah 1982); *Investment Corp. of America*, 39 B.R. 758 (S.D. Fla. 1984); *Win-Sum Sports, Inc.*, 14 B.R. 389 (D. Conn. 1981); *Luftek, Inc.*, 6 B.R. 539 (E.D.N.Y. 1980).

here, where the class could *not* have compelled a bankruptcy filing at the time of the settlement.

Thus, as the Fifth Circuit made clear, it is not necessary to hold that Rule 23(b)(1)(B) may always be invoked when a defendant is insolvent in order to affirm the propriety of the invocation of the Rule in this case. CA 76a-78a. There is *no* reason — and certainly nothing in the Bankruptcy Code itself — to bar application of the Rule on the facts here, where the class could not avail themselves of the Bankruptcy Code's provisions until some time in the indeterminate future and then only after *forfeiting* their only source of meaningful recovery.

For this reason, the sole provision of the Bankruptcy Code that petitioners actually do invoke (11 U.S.C. § 524(g)-(h)) simply illustrates the fallacy of their argument. That section — which was, in any event, not added until one year *after* the Global Settlement was reached — permits enforcement of an injunction channeling present and future asbestos claims to a trust if certain specified criteria are met, but *only* where an asbestos defendant can be forced into bankruptcy or enters it voluntarily. The section confers absolutely no power on the future claimants to force an *unwilling* defendant into bankruptcy. And as the District Court found, Fibreboard had long since determined that it would not voluntarily enter bankruptcy, given the prospect that by prevailing in the coverage litigation it could avoid bankruptcy altogether. CA 78a-79a, 376a. This section simply has no relevance to the actual circumstances of this case.*

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* Neither, for the same reason, does the dicta in *Keene Corp. v. Fiorelli*, 14 F.3d 726 (2d Cir. 1993), upon which petitioners rely. There, a former asbestos manufacturer that *could* have been (and shortly thereafter *was*) forced into bankruptcy tried to evade that result through a "preemptive" mandatory defendant class action seeking to *compel* all claimants to "settle" with it outside of bankruptcy. *See id.* at 728. The Second Circuit dismissed this "suit" for lack of a case or controversy and expressly did not decide the propriety of Rule 23(b)(1)(B) certification. *See id.* at 728, 730 & n.1, 733. The court's additional language on which petitioners rely thus (1) is a "gratuitous discussion" not necessary to the decision in that case (CA 75a n.14); and (2) does not speak to the issue

POINT II

RULE 23(b)(1)(B)'s PLAIN LANGUAGE DOES NOT VIOLATE THE CONSTITUTION OR THE RULES ENABLING ACT.

Petitioners are thus left to argue that application of the Rule's plain language violates the Constitution or the Rules Enabling Act. Their arguments on this score face two heavy burdens at the outset: (1) they must demonstrate why this Court should hold — for the first time ever — that an intended application of one of the Federal Rules of Civil Procedure would be unconstitutional or invalid, and that "the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule [does not] transgress . . . the terms of the Enabling Act or constitutional restrictions" (*Hanna v. Plumer*, 380 U.S. 460, 471 (1965)); and (2) they must offer a coherent explanation why the federal courts, on their argument, are constitutionally foreclosed from achieving a unitary resolution whenever the case involves "*in personam*" claims (Br. 33, 40), no matter how devastating the consequences to the class. As shown below, they have not remotely done either.

A. Rule 23(b)(1)(B) is not unconstitutional.

Far from overcoming the presumption that the Rule's plain language is constitutional, petitioners' due process objection consists entirely of a series of *ipse dixit* pronouncements belied by a wealth of precedent.

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here whether the Bankruptcy Code forecloses the ability to settle even where the defendant could *not* be put into bankruptcy. (Moreover, on the occasions that the Second Circuit has actually *decided* the point — including one decision *subsequent* to the gratuitous discussion in *Keene* — it has squarely held that Rule 23(b)(1)(B) may properly be applied in appropriate cases involving insolvent entities. *See In re Joint E. and S. Dist. Asbestos Litig.*, 78 F.3d 764, 777-78 (2d Cir. 1996); *In re Joint E. and S. Dist. Asbestos Litig.*, 982 F.2d 721, 737-39 (2d Cir. 1992); *In re Drexel Burnham Lambert Co.*, 960 F.2d 285, 292 (2d Cir. 1992).)

1. *Where a unitary resolution is necessary to protect the class, the constitutionality of mandatory class treatment of monetary claims is long settled.* — As detailed in the opinion below, the constitutionality of mandatory class actions properly certified under the applicable rules of procedure is established by centuries of jurisprudence. CA 81a-84a. This Court has explicitly or implicitly approved mandatory class resolutions in a host of cases, including classes involving future claimants and classes involving monetary claims.* In such cases, due process requires only that absent class members be afforded adequate representation, not a right to opt out: it is a "familiar doctrine . . . that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present." *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940); *see also Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 367 (1921) ("If the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree when rendered must bind all of the class properly represented."); *Smith v. Swormstedt*, 57 U.S. [16 How.] 288, 302-03 (1854) ("[A] court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The . . . rights and liabilities of all being before the court by representation, . . . there can be very little danger but that the interest of all will be properly protected and maintained.").

The controlling principle expressed by these cases is straightforward: where there is a legitimate need for a unitary resolution in order to protect the class, and where adequate representation is afforded, the general presumption in favor of

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* *See, e.g., Missouri v. Jenkins*, 495 U.S. 33, 37 n.2 (1990); *County of Riverside v. McLaughlin*, 500 U.S. 44, 49 (1991); *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 193 (1991); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366-67 (1921); *Smith v. Swormstedt*, 57 U.S. [16 How.] 288, 302-03 (1854); *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662, 670-72 (1915).

individualized actions is subordinated to equitable concerns permitting a mandatory class action. *See, e.g., Smith*, 57 U.S. at 303 (citing the need to "prevent a failure of justice"); *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662, 670 (1915) (citing the need to avoid "destructi[on] of [class members'] mutual rights"); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950) (citing the need to achieve a "final settlement," and stressing that due process cannot be construed to "place impossible or impractical obstacles in the way" of satisfying such a need); *see also West v. Randall*, 29 F. Cas. 718, 723 (C.C.D.R.I. 1820) (Story, J.) (emphasis added) (describing the common-law practice of mandatory class resolutions as standing on "[t]he principle . . . that the court must either wholly deny the plaintiffs an equitable relief, to which they are entitled, or grant it without making other persons parties; *and the latter it deems the least evil*").

Of particular importance, these cases have made clear that a legitimate need for a unitary class resolution of monetary claims *does* exist where — as here — such a resolution is necessary to secure the entire class's source of monetary recovery. For example, in *Smith*, this Court upheld a unitary resolution "to prevent a failure of justice" in circumstances much like those presented here: where persons with "separate and distinct" monetary claims against a pool of disputed assets brought a nationwide class suit to advance their "common interest[s]" in establishing their joint ownership of the disputed funds and a process for equitably distributing them, but where that relief could be secured only through a unitary resolution. *Id.* at 302-03. Similarly, *Supreme Tribe of Ben-Hur* validated a nationwide mandatory class resolution of monetary claims against an insurance trust — including fraud claims — where a uniform resolution binding "all of the class" was necessary to make the resolution "effective" and to permit the trust to continue to pay benefits owed to class members. *See* 255 U.S. at 359, 366-67. And in *Mullane*, this Court rejected a due process challenge identical to that raised by petitioners here to a mandatory resolution of money damages claims arising out of

the alleged negligent mismanagement of a trust where such a resolution was necessary to achieve a "final settlement" of all claims involving the trust. *See* 339 U.S. at 310-14.*

These precedents of this Court, moreover, reflect an even longer tradition of unitary class resolutions of monetary claims where necessary to prevent "a positive denial of justice" to class members. Story, *Commentaries on Equity Pleadings*, § 100 (2d ed. 1840); *see also id.* at §§ 97-98, 120-21. Mandatory "representative suits involving money claims were adjudicated in equity as a matter of course from early times" in those circumstances where class members' claims would otherwise be prejudiced. Z. Chaffee, *Some Problems of Equity* 285 (1950).** And it was well recognized that the circumstances permitting a unitary resolution included suits — precisely like that here — to establish a class's joint rights to disputed assets and a process for equitably distributing them among class members. *See Leigh v. Thomas*, 28 Eng. Rep. 201 (Ch. 1751) (mandatory class action may be brought by two members of the

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* Although *Mullane* was not technically a class action, it nonetheless involved a mandatory representative settlement of accounts encompassing "future," "contingent," "missing" and "unknown" parties from around the nation (who were represented by guardians ad litem). *See* 339 U.S. at 309-11, 317-18. This Court's rejection of the due process challenge in *Mullane* is accordingly fully applicable here.

** The dissent below erroneously attempted to explain away this practice of unitary resolutions of monetary claims as limited to circumstances where class members' individual claims were themselves equitable in nature. CA 130a-31a. The cases, however, make clear that courts of equity had power to achieve "equitable" unitary resolutions in order to prevent unfairness even where the underlying individual claims that gave rise to this need were claims at *law*: it was "immaterial that the basic issues [were] legal and not equitable." Chaffee, *supra*, at 156; *see also id.* at 151-52; *see also Smith*, 57 U.S. at 303 (power of a court to achieve a unitary resolution "to prevent a failure of justice" extends to "[t]he *legal* and equitable rights and liabilities of all being before the court by representation") (emphasis added); *Adair v. New River Co*, 32 Eng. Rep. 1153, 1159 (Ch. 1805) (describing the practice as allowing "a person, having at *Law* a general right to demand service from the individuals of a large district . . . [to] sue thus in Equity") (emphasis added).

crew of a privateer ship as representatives for the entire crew to establish crew members' rights to a share of prize money); *Good* v. *Blewitt*, 33 Eng. Rep. 343 (Ch. 1807) (same).*

Petitioners' attempt to distinguish these cases as involving "people with a pre-existing jural relationship" (Br. 29 n.23) is without merit. Class members here had no less of a "pre-existing jural relationship" than did the Methodist ministers with "separate and distinct" claims in *Smith v. Swormstedt* or than did the claimants in the other cases described above: all class members here had identical claims under and interests in the disputed insurance policies, upon which their potential recoveries were entirely dependent. *See* Class Br. 24-25. This action, in which they seek to resolve their rights of ownership of the proceeds of those policies notwithstanding the coverage dispute and thus necessarily to establish a process for equitable distribution of the proceeds, is analytically indistinguishable from, for example, *Smith* and *Good*, where class members sought to do the same with respect to their sources of recovery.

2. *There is no "in rem/in personam" distinction.* — Faced with this array of authority, petitioners resort to a hair-splitting distinction that they do not even argue has any basis in the language of Rule 23(b)(1)(B) or in so much as a single decided case. They contend that the permissibility of a unitary resolution of monetary claims turns not on whether the class has a legitimate need for such a resolution, but on a code-pleading categorization of the relief class members seek: according to petitioners, such a resolution is permissible where class members assert "*in rem* claim[s]" for "apportionment of a common fund," but is unconstitutional whenever the class instead asserts *in personam* "money damages" claims. Br. 40. In other words, they maintain that a unitary resolution would have been permissible here had the class sought to divide a "preexist[ing]"

* Other examples of unitary class resolutions of monetary claims at common law include *Adair v. New River Co.*, 32 Eng. Rep. 1153 (Ch. 1805); *Chancey v. May*, 24 Eng. Rep. 265 (Ch. 1722); *Brown v. Vermuden*, 22 Eng. Rep. 796 (Ch. 1676); and *Brown v. Booth*, 21 Eng. Rep. 960 (Ch. 1690).

"common fund" (Br. 32-34), but that such a resolution somehow became impermissible because class members needed it in order to secure the common fund in the first place.

This "distinction" is totally belied by the cases cited above. For example, the petitioners in *Mullane* made this precise argument, claiming that a unitary resolution of their monetary damages claims violated their due process rights to the extent it encompassed *in personam* tort damages claims, as opposed to *in rem* claims. *See* 339 U.S. at 311-12. Justice Jackson, writing for the Court, squarely rejected this proposed *in rem/in personam* distinction, holding that "the requirements of [due process] do not depend upon [this] classification . . . . Without disparaging the usefulness of distinctions between actions *in rem* and those *in personam* in many branches of law . . . we do not rest the power" to achieve a unitary resolution upon "this historic antithesis." *Id.* at 312-13. Likewise, in *Hansberry*, this Court — expressly citing *Smith* and *Supreme Tribe of Ben Hur* — described the practice of mandatory class resolutions of monetary claims as "a recognized exception" to the "general rule" that "judgment[s] *in personam*" are not binding against absent parties. 311 U.S. at 40-41.

Accordingly, *Mullane* and many of the cases referred to above involved classically *in personam* claims. For example, *Mullane* expressly involved *in personam* tort claims for money damages (339 U.S. at 311-14); *Supreme Tribe of Ben-Hur* involved claims for fraudulent inducement as well as monetary claims based on contractual rights (255 U.S. at 358-59); *Smith* involved class members' assertion of "separate and distinct" monetary claims of ownership of disputed funds as a matter of contract interpretation, and was an action (as here) not simply to allocate a "common fund," but to secure the class's right to that fund in the first place (57 U.S. at 300, 302); *Chancey* v. *May*, 24 Eng. Rep. 265 (Ch. 1722), involved fraud claims against the managers of a business; and *Adair v. New River Co.*, 32 Eng. Rep. 1153 (Ch. 1805), involved alleged rent overpayments under a contract. *See also* Story, *Commentaries*, § 100, at 103 n.1 (describing the historical practice of unitary

resolutions of *in personam* monetary claims "for the purposes of justice" where "there will be a deficiency of assets, so that all the creditors cannot be paid in full").*

A long line of precedent thus squarely rejects petitioners' "*in rem*" talisman, and establishes instead that the federal courts may achieve a unitary resolution where necessary to protect the class — regardless of the particular nature of the claims that class members advance or the relief they seek. These precedents supply ample basis to sustain the judgment of "the Advisory Committee, this Court, and Congress" (*Hanna*, *supra*) in adopting the identical approach in Rule 23, and to sustain the application of the Rule's plain language here.

Rule 23(b)(1)(B), as the Fifth Circuit explained, is the present-day equivalent of the traditional class actions discussed above. CA 83a & n.16; *see* Advisory Committee Note, 39 F.R.D at 101 (expressly citing *Smith* and *Supreme Tribe of Ben-Hur* as examples of class actions within the Rule).** As its language makes clear, it likewise makes the propriety of a

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* Petitioners' effort to claim that — contrary to Justice Story and the precedents discussed above — there was actually a common law rule preventing unitary resolution of "*in personam*" claims and requiring that such claims be resolved individually and on the basis of "chronological priority" (Br. 32) rests solely upon a single 5-page decision of a state trial level court, which does not itself cite any authority for its assertion. Moreover, even this opinion goes on to indicate that, under traditional principles, a unitary "equity action" *could* be brought by *in personam* creditors "for the purpose of ratable apportionment." *David v. Bauman*, 196 N.Y.S.2d 746, 748 (N.Y. Sup. 1960). Petitioners also contend that the practice of unitary resolutions of *in personam* claims is inapplicable here because the settlement of this action does not contain all of Fibreboard's equity and because "other tort and trade creditors" of Fibreboard are not included within the class. Br. 35. These arguments are identical to the arguments of the Trial Lawyers shown to be without merit above. *See* pp. 29-30, *supra*.

** Rule 23(b)(1)(B) actions — and actions under the remaining subsections of Rule 23(b)(1) and (b)(2), which set forth other circumstances in which potential prejudice to the class or the defendant arising from opt-out rights necessitates a unitary resolution — trace their lineage from a series of equitable procedural rules providing mandatory class

unitary resolution turn on the need to protect class members rather than on the specific type of relief class members seek. By contrast, Rule 23(b)(3) requires opt-out rights in those actions that would *not* have qualified for class treatment at common law because class members would not be prejudiced by allowing separate suits, but as to which current procedure nonetheless allows class resolution of certain "common questions" where "convenient and desirable" to "achieve economies of time, effort and expense." Advisory Committee Note, 39 F.R.D. at 102-03; *see Amchem*, 117 S. Ct. at 2245-46.*

Nor have petitioners offered any reason whatever for their proposal that this Court change course, jettison almost 150 years of unbroken prior precedents and invalidate Rule 23(b)(1)(B)'s plain language. As discussed above, and as this case amply attests, class members often have an equal — or indeed a greater — need for a unitary resolution where the case does not involve "*in rem*" claims than where it does. *See* pp. 28-29, *supra*. And since the class here was adequately represented and the Global Settlement is indisputably fair, there is no question of unfairness to absent class members. *See* Class Br. 29-42; *Hansberry*, 311 U.S. at 41-43; *Smith*, 57 U.S. at 303 (unitary resolutions are permissible where adequate represen-

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mechanisms, including the seventeenth-century English Bill of Peace and Federal Equity Rule 38 (adopted in 1912), under which "[l]imited fund and other no-opt-out class actions were recognized" and "absent parties could be bound by . . . judgments." 1 Newberg on Class Actions, § 1.09 at 1-24; *see* Miller & Crump, *Jurisdiction and Choice of Law*, 96 Yale L.J. 1, 39-40 (1986). Indeed, their direct precursors were the non-opt-out "true" and "hybrid" class action categories of original Rule 23 (adopted in 1938). *See* 1 Newberg, § 1.09 at 1-25 - 1.27; 3B Moore & Kennedy, *Moore's Federal Practice* ¶23.31[1], at 23-235 (1992).

* Rule 23(b)(3) class actions are an innovation of the 1966 amendments to the Rule. To the extent they are traceable to any prior procedure, it is not to the traditional class action but to the "spurious" class action first created in 1938 by original Rule 23, which fashioned what was essentially a permissive joinder device, binding class members only if they opted *into* the class. *See* Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 43 (1967).

tation is afforded because "[t]he . . . rights and liabilities of all being before the court by representation, . . . there can be very little danger but that the interest of all will be properly protected and maintained"). This Court is thus being asked to invent an *in rem/in personam* distinction in a context where the historical practice affirmatively *rejected* that distinction, where the language of the governing Rule does so as well, and where the distinction would greatly prejudice the class. The Court should decline the invitation.

3. *Shutts does not say otherwise.* — Finally, petitioners' invocation of a sentence in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985), requiring opt-out rights on the facts of that case does nothing to avail their cause. As this Court has explained, this language in *Shutts* addresses only the question whether a "state court lacked personal jurisdiction over out-of-state class members, *not* the different and broader question of whether . . . due process requires that all class members have the right to opt out." *Adams v. Robertson*, 117 S. Ct. 1028, 1030 (1997) (emphasis added). It is thus totally irrelevant to petitioners' principal claim.

Nor does the sentence in *Shutts* support petitioners' fallback due process contention: that even if all class members do not have an absolute constitutional right to opt out, opt-out rights must be given to those class members who lack "minimum contacts" with the forum State. Br. 41. As this Court explained elsewhere in the *Shutts* opinion, "minimum contacts" requirements do *not* govern inclusion of absent plaintiffs within a class action. *Shutts*, 472 U.S. at 808-11. Accordingly, this Court's decisions in *Mullane* and *Smith* both explicitly upheld mandatory resolutions of monetary claims binding absent plaintiffs who lacked *any* contact at all with the forum State. *Mullane*, 339 U.S. at 309, 311; *Smith*, 57 U.S. at 289, 303.

Far from overruling *Mullane* and *Smith sub silentio*, the sentence in *Shutts* addresses personal jurisdiction concerns in a different genre of cases entirely: *state*-court class actions where the class has no need for a mandatory resolution and where such a resolution would thus have been impermissible under

the traditional practice set forth above. As the Fifth Circuit observed, *Shutts* involved a "class action brought under a state rule virtually identical to [Rule] 23(b)(3)" (CA 81a) — that is, there was no need for a unitary resolution, and the class was certified instead merely for litigation convenience. In a *federal* class action brought under these circumstances, Rule 23(b)(3) itself would give class members the right to opt out. There could, however, be no assurance that a *state* rule of procedure would do likewise: the sentence from *Shutts* invoked by petitioners was thus aimed at preventing *states* from circumventing personal jurisdiction limits on *state* courts by expanding *state*-court mandatory class actions to situations where such actions would not have been permissible under traditional practice. *See Adams*, 117 S. Ct. at 1030 (*Shutts* limited to the issue whether a "*state* court lacked personal jurisdiction over out-of-state class members") (emphasis added).* This sentence thus did not alter the settled validity — exemplified by *Mullane*, *Smith* and the other cases discussed above — of mandatory nationwide class actions involving monetary claims where a need for a unitary resolution *does* exist and where such a resolution thus *is* permissible under traditional practice.

For this very reason, the *Shutts* opinion expressly limited the sentence relied upon by petitioners to "those class actions

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* Indeed, as this Court indicated in *Adams*, the sentence in *Shutts* has no relevance at all to *federal* class actions. Whereas state courts can ordinarily assert jurisdiction only over parties having minimum contacts with the state, the Constitution permits federal courts to assert personal jurisdiction nationwide. *E.g.*, *United States v. Union Pac. R.R. Co.*, 98 U.S. 569, 604 (1878). Contrary to petitioners' *ipse dixit*, this principle applies fully in diversity cases. It is easy to overlook this point because Rules 4(e) and 4(k) normally require that *defendants* in diversity cases have minimum contacts with the state in which the federal court sits. Those Rules, however, make expressly clear both that the requirement is *not* a constitutional one (Fed. R. Civ. P. 4(e), 4(k)(1)(D), 4(k)(2)) and that it applies only to a "defendant." By contrast, Rule 23 — the Rule governing inclusion of absent *class* members in a class action — imposes no such requirement in diversity cases.

which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments" and "intimate[d] no view concerning other types of class actions, such as those seeking equitable relief." 472 U.S. at 811-12 n.3. As the Fifth Circuit explained, far from invalidating Rule 23(b)(l)(B)'s plain language and overruling this Court's prior cases without saying so directly, *Shutts* thus recognized the basic historical division reflected in Rule 23: unitary resolutions are permitted of those class actions that descend from *Smith*, *Mullane* and the other traditional "equitable" class actions discussed above — *i.e.*, class actions under Rules 23(b)(l) and (b)(2); opt-out rights are required for those that do not, where the use of the class action device is merely a form of "permissive joinder" — *i.e.*, Rule 23(b)(3). CA 83a & n.16; *see* p.41 n.*, *supra*.*

B. Rule 23(b)(1)(B) does not violate the Rules Enabling Act or the Rules of Decision Act.

For the same reasons, petitioners' Rules Enabling Act contention — for which they cite virtually no authority at all — is meritless. As shown above, the appropriateness of a unitary class resolution under the circumstances of this case was well-settled for centuries before the Enabling Act was enacted in 1938. *See* pp. 35-40, *supra*. There thus hardly could have been a contrary "substantive right" to opt out at that time, and there hardly can be one now. In effect, then, petitioners are arguing that the Enabling Act actually *contracts* the previously existing authority of the federal courts. This argument is without basis. *See Supreme Tribe of Ben-Hur*, 255 U.S. at 366 (rejecting claim that a Federal Equity Rule improperly conferred jurisdiction by "a rule of court" where class action was permissible under pre-existing practice).

Indeed, petitioners' unsupported claim that class members have a "substantive right" to seek judgments on their individ-

* In fact, as shown in the brief filed by the Plaintiff Class, the gravamen of this action is for quintessentially "equitable relief": a determination that the insurers in fact owe coverage on the class's claims notwithstanding the coverage dispute. Class Br. 24-26.

ual claims "*in full*" (Br. 32) — even where their doing so would greatly prejudice the rest of the class's claims — would effectively render unitary class resolutions impermissible in virtually *any* case, contrary to settled law. Absent class members can *always* assert this supposed "substantive right" to "full" recovery: to the full amount of their alleged damages in monetary cases, or to the broadest injunction or declaration where that relief is sought. And these class members can likewise *always* complain that a mandatory class resolution that gets them less than everything they asked for (as will inevitably happen in settlement, and as will frequently happen where the case is litigated) is an illegitimate forced compromise of this "substantive right" through the rules of procedure.*

No sensible argument can be made that application of Rule 23 to certify the class in such a situation violates the Rules Enabling Act. Any limitation on class members' "rights" to full recovery results from the *settlement*, not from the bringing of this action under Rule 23. As in *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 445-46 (1946), the bringing of this action as a class action under Rule 23 — as distinguished from the *settlement* of the action — merely "subject[ed] petitioners' rights to adjudication by [a particular] district court"; it did "not operate to abridge, enlarge or modify the rules of decision by which that court w[ould] adjudicate [petitioners'] rights," and "relate[d] merely to the manner and the means by which a right to recover is enforced."** Unless one is prepared to say

* This would include the very "*in rem*" situation in which petitioners themselves allow that a unitary resolution would be permissible: even where a class has claims against a "preexist[ing]," insufficiently large "fund," each class member may have an individual claim to a 100-cents-on-the-dollar, disproportionate share of that fund. Petitioners are silent (a) why, on their novel view of the Rules Enabling Act, these individual rights to seek "full" recovery can be "limited" to protect the class's overall interest; and (b) why the supposed "substantive right" to full recovery can be limited in that situation but in no other.

** Totally misrepresenting the brief in opposition filed by the Plaintiff Class, petitioners assert that respondents "concede that the whole point of the class certification here was to abridge state-law rights

that, by virtue of the Rules Enabling Act, a mandatory class action can be brought and adjudicated, but may never be *settled* for less than "full" recovery — a rather absurd proposition — petitioners' argument cannot stand. The essential safeguards against abrogation of substantive rights are the provisions of Rule 23 limiting the types of cases in which non-opt-out classes may be certified, the requirement that the class be adequately represented and the Rule 23(e) requirement that any settlement be adjudicated to be fair. *See Hansberry*, 311 U.S. at 40-43.* All of these requirements were met here.

For the same reasons, there is no merit to petitioners' claim that the unitary Global Settlement violates the Rules of *Decision* Act because the class's underlying claims were state-law rather than federal in nature. Once again, the very minor outer limits the Settlement imposes on class members' recoveries in "back-end" suits against the Trust in the tort system (*see* pp. 21, *supra*; Class Br. 16-17) are the product of a fair settlement as to which the class was properly certified and adequately represented. Since *some* limits on state-law claims (or recoveries arising from them) are an inevitable part of *any* class settlement involving such claims, petitioners' argument boils down to the untenable proposition that it is impossible to set-

'by limiting class members' rights to obtain immediate and full payment of their individual state-law claims.' " Br. 33 (quoting Class BIO 20). This partial quotation excises the remainder of the sentence, which contends that petitioners "*err*" in asserting exactly that, as well as the ensuing 3 pages of discussion so demonstrating.

* The basic principle is simple: assuming that the class is properly certified, the class adequately represented and the settlement fair, the class may through settlement agree to that which an individual litigant could agree. *See Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 883 (1996) (class release of claims that were not before state court and over which court did not have subject-matter jurisdiction); *TBK Partners v. Western Union*, 675 F.2d 456, 460 (2d Cir. 1983); *Grimes v. Vitalink*, 17 F.3d 1553, 1564 (3rd Cir. 1994); *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 34 (1st Cir. 1991).

tle *any* mandatory class action in a diversity case without running afoul of the Rules of Decision Act.*

POINT III

THE NOTICE CAMPAIGN — THE MOST EXTENSIVE IN HISTORY — WAS CONSTITUTIONALLY ADEQUATE.

Petitioners' final objection is that class members were not provided with notice sufficient to satisfy the requirements of due process. Petitioners do not suggest that the parties could have improved in any way upon the $18 million worldwide television, direct mail and newspaper notice campaign here — the most comprehensive such campaign ever in a class action. *See* pp. 12-13, *supra*. Instead, they advance one last categorical rule: that future claimants can *never* be given constitutionally adequate notice in any class action. Br. 43.

This proposition is completely devoid of support. Indeed, this Court specifically rejected this precise argument in its seminal decision on due process notice requirements: *Mullane v. Central Hanover Bank*. At issue in *Mullane* was a mandatory representative settlement that "settle[d] all questions" respecting the management of a trust, including *in personam* tort claims for money damages held by "future," "contingent," "missing" and "unknown" beneficiaries. 339 U.S. at 309-11, 317-18. Reasoning that "[a] construction of the Due Process Clause which would place impossible or impractical obstacles in the way" of such a resolution "could not be justified," this Court rejected petitioners' categorical approach regarding notice to future claimants. It held instead that current publication notice — far *less* extensive notice than was afforded here — was sufficient with respect "to those beneficiaries whose

* There is similarly no merit to amicus American Trial Lawyers' Association's contention that the Global Settlement abridges the right to a jury trial by placing some (likewise minor) limits on what a jury can award (an argument that would make it impossible to settle virtually any mandatory class action involving monetary claims).

interests are either conjectural or future" or who could not be identified without "impractical and extended searches." *Id.* at 313-14, 317. As Justice Jackson wrote for the Court:

> [t]his Court has not hesitated to approve of resort to publication as a customary substitute . . . where it is not *reasonably possible or practicable* to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights.

Id. at 317 (emphasis added).

This holding — that due process requires only the best notice "reasonably possible or practicable," and does not create a "constitutional bar to a final decree foreclosing the[ ] rights" of future claimants who cannot be identified and given actual notice through reasonable effort — has been reconfirmed by this Court many times over in ensuing years. *See, e.g., Tulsa Professional, Inc. v. Pope*, 485 U.S. 478, 490 (1988) (publication notice "can suffice" for claimants "who are not reasonably ascertainable"); *Mennonite Bd. v. Adams*, 462 U.S. 791, 798 (1983) (constructive notice sufficient for claimants "not reasonably identifiable"); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175 (1974) (individual notice not required to class members not "identifiable through reasonable effort"); *Schroeder v. City of New York*, 371 U.S. 208, 212-13 (1962) (because of the "practical impossibility" of providing actual notice to "unknown persons," publication notice may suffice for persons not "known or very easily ascertainable"); *Walker v. City of Hutchinson*, 352 U.S. 112, 116 (1956) (not "reasonably possible to give personal notice . . . where people are . . . unknown"). And contrary to petitioners' meaningless "distinction" — that *Mullane*, while involving a mandatory representative action, "did not involve a class action" (Br. 43) — this Court has squarely deemed *Mullane*'s holding to be fully applicable to class actions. *E.g., Eisen*, 417 U.S. at 174-75.

Moreover, petitioners' proposal that the Court effectively overrule *Mullane* is particularly meritless in the context of the *mandatory* class action settlement involved here. *First*, based on the settled precedent of *Mullane*, this Court and the lower courts routinely decide mandatory class action suits involving claims on behalf of unknown, future claimants — including, for example, future schoolchildren, future housing tenants, future employees, and future prisoners. *See, e.g., Missouri v. Jenkins*, 495 U.S. 33, 37 n.2 (1990); *County of Riverside v. McLaughlin*, 500 U.S. 44, 49 (1991); *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 193 (1991). Likewise, as the Fifth Circuit observed, Rule 23(b)(1)(B) class actions "often involve unknown or unavailable claimants" and "bind[ ] future, contingent, and unknown claimants." CA 84a.* This practice recognizes that, while the precise identities of the persons who will ultimately be future claimants cannot be known now, those persons sometimes need an immediate resolution to protect the rights they will eventually develop — as did the class members here. Petitioners' argument that these class members can never be given constitutionally adequate notice, however, would invalidate this practice completely.

Second, class members in mandatory class settlements do *not*, by definition, need to make an individual decision whether to opt out of the action. The only decision that confronts them is whether to *object* to the settlement for purposes of the district court's fairness hearing on the settlement and any subsequent review: if the courts approve the settlement, all class members are bound, whether they objected or not. And on this point, the interests of potential unknown objectors are fully represented by those class members who do object. For example, it is clear that the petitioners here — who intervened in this case as objectors at the fairness hearing, and have litigated

---

* These actions, in turn, grew out of the even older practice of representative actions to resolve the future claims and protect the future interests of unborn heirs or unborn trust beneficiaries. *See, e.g., McArthur v. Scott*, 113 U.S. 340, 401-02 (1885).

every imaginable challenge to the Global Settlement — have fully represented the point of view opposing the Settlement.

This contrasts sharply with the situation in Rule 23(b)(3) opt-out class actions, where class members need to make an immediate, individual and *personal* decision whether to opt out of the action or settlement entirely — a decision as to which unknown future class members are *not* represented by other parties, which they may lose the opportunity to make if not given actual notice, and which they may not be able intelligently to make even if they are given such notice. It was *this* issue — and not the continued vitality of *Mullane* in the *mandatory* class context — that this Court "recognized" in *Amchem* as a potential issue for future decision: whether current notice can provide future claimants with "the information . . . needed to decide, intelligently, whether *to stay in or opt out*." 117 S. Ct. at 2252 (emphasis added).* Petitioners' suggestion that *Amchem*'s reservation of this possible issue somehow draws the seminal decision in *Mullane* into question in this distinct mandatory class context is without basis.

In short, since the best notice "reasonably possible or practicable" was provided here — as the District Court found and as petitioners do not contest — due process was satisfied.

Conclusion

The mandatory class settlement here falls foursquare within the plain language of Rule 23(b)(1)(B). It is concededly fair under Rule 23(e). It in no way runs afoul of the Bankruptcy Code, the Rules Enabling Act or Due Process. For the foregoing reasons, the judgment of the Fifth Circuit should be affirmed.

---

* Petitioners' cropping of their quote from *Amchem* immediately prior to the words identifying this Court's concern as pertaining to an opt-out decision (Br. 42) — as well as their assertion on the following page that *Amchem* actually reached a "conclusion" on this issue rather than simply recognizing it for future decision — are nothing short of a blatant misrepresentation of that case.

Dated: September 9, 1998

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APPENDIX

11 U.S.C. § 305. Abstention

(a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if —

(1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or

(2)(A) there is pending a foreign proceeding; and there is pending a foreign proceeding; and

(B) the factors specified in section 304(c) of this title warrant such dismissal or suspension

(b) A foreign representative may seek dismissal or suspension under subsection (a)(2) of this section.

(c) An order under subsection (a) of this section dismissing a case or suspending all proceedings in a case, or a decision not so to dismiss or suspend, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of title 28 or by the Supreme Court of the United States under section 1254 of title 28.

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Supreme Court of the United States
OCTOBER TERM, 1997

ESTEBAN ORTIZ, *et al.*,
Petitioners,

v.

FIBREBOARD CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari of Certiorari to the United States Court of Appeals for the Fifth Circuit

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COUNTER-STATEMENT OF THE CASE

Law professors develop hypothetical facts to illuminate selected principles of law for their students. Courts of law, however, find the actual facts and then determine the legal principles to be applied. Petitioners and their *amici*, in their zeal to discredit the detailed findings and conclusions of the District Court twice approved by the Court of Appeals, disregard the record, grossly misstate the facts and distort the context of this case well beyond fair advocacy.

In the summer of 1993, the ominous situation faced by the members of what would become the *Ahearn* class was not hypothetical. It was very real and fraught with financial peril for each of the many tens of thousands of men and women who had worked with Fibreboard asbestos from the 1920's through the 1970's, but had not yet succumbed to debilitating illness or death and brought claims. CA 231a-232a, 357a-358a.[1]

On August 26, 1993, the day before settlement in principle was reached, the families of those thousands of class members had *no* prospect of any meaningful recovery from Fibreboard absent a favorable resolution of Fibreboard's then-ongoing insurance disputes. CA 42a, 277a. Fibreboard's $235 million in assets were already dwarfed by well over $1.2 billion in unpaid settlement amounts owed to earlier asbestos victims. CA 75a, 302a-303a. In the absence of substantial additional funds, all of Fibreboard's asbestos victims could expect to receive little more than pennies on the dollar. CA 75a, 357a-358a.

Yet, on August 26, 1993, there was a real hope that the insurance disputes could all be resolved favorably enough to provide sufficient funds to make full recoveries for all a distinct possibility. CA 239a, 360-361a. This case is about whether the *Ahearn* class members had standing to participate in the determination of those disputes and, thus, in the molding of a

[1] As used in this brief, references to "CA" are to the appendix submitted with the petition for certiorari; to "JA" are to the joint appendix; to "Fib. App." are to the appendix to the brief in opposition filed by Fibreboard; to "Ins. BIO" are to the brief in opposition filed by the insurers; to "Br." are to petitioners' brief; to "Set. Def. Br." are to the brief filed by Fibreboard and the insurers; to "Sch. Br. " are to the *amicus* brief filed by certain legal ethics, etc., "Scholars"; and to "TLPJ Br." are to the *amicus* brief filed by Trial Lawyers for Public Justice.

favorable resolution with Fibreboard and its insurers, or whether - as petitioners maintain - the Constitution and substantive and procedural law required them to stand idly by while Fibreboard and its insurers continued to roll the dice and risk the class members' financial futures.

August 26, 1993 was not an arbitrary deadline. The last of a series of arguments in Fibreboard's 14-year insurance litigation was scheduled for August 27, 1993, with a decision by the California intermediate appellate court expected shortly thereafter. CA 270a, 330a. Fibreboard had hit a grand slam home run in the trial court on all of the many very difficult policy construction issues raised. CA 268a-269a. The trial court had held that policies issued to Fibreboard by Pacific Indemnity and Continental Casualty during the late 1950's had overlapping coverage, each providing $500,000 per claim coverage without aggregate limits, and that those policies triggered the responsibility of each of the insurers to all claims where exposure to asbestos occurred during or at anytime prior to the policy period – even if *none* of the exposure occurred during the policy period – and even if the manifestation of disease likewise did not occur during the policy period. CA 268a-269a. Moreover, the trial court determined that each policy's scope of coverage made it responsible for the *entire* claim, not a fraction of the claim reflecting the short term of the policy compared to the long years of exposure. CA 269a. If these rulings were affirmed, Fibreboard's two insurers both had virtually unlimited and overlapping responsibility for Fibreboard's asbestos liabilities for all claimants with any exposure to asbestos prior to March 15, 1959. As a result of the overlap, Fibreboard had been able to negotiate a policy buyout in 1992 with Pacific contingent on Fibreboard's success on the coverage appeal, a buyout which would provide funds to pay for the more limited claims against Fibreboard that were based on exposure that first occurred on or after March 15, 1959. CA 267a, 283a-285a.

However, any reduction by California's appellate courts of these expansive constructions of the policies by the trial court easily could have left Fibreboard and the *Ahearn* class members with little or no coverage. JA 140a. By definition,

Ahearn class members had not manifested illness during the policies' periods. Absent the trial court's ruling that this did not matter, there would be *no* insurance proceeds for them. Likewise, a restrictive ruling on scope of coverage alone could have reduced available coverage to a small percentage of the damages suffered. As the District Court found, there was a "significant risk" of an outcome unfavorable to the class. CA 52a, 75a-77a, 272a-276a, 357a-358a; JA 139a-141a. Set. Def. Br. 3-7, 15-16.

Moreover, overlaying the risks inherent in the policy construction litigation and lurking in the wings was a claim by Continental that Fibreboard's practice of settling asbestos claims by assigning rights under the policy breached Fibreboard's policy obligations and, as a result, vitiated the coverage *in toto*. CA 231a, 288a. This issue was being litigated in various courts where Fibreboard and settling claimants sought declaratory judgments against Continental blessing the assignments. CA 288a-290a. As of August 26, 1993, one trial court had decided the issue favorably to claimants and Fibreboard. CA 288a-290a. But that matter was on appeal and the issue was being tested in other venues as well. JA 61a-62a.

Two leading insurance law experts testified at the six-day fairness hearing that the risks to the class on appeal were acute. CA 272a-276a. Indeed, at the Fifth Circuit, petitioners agreed. Quoting the District Court's findings with approval, petitioners told the Court of Appeals that the risk of nonrecovery of insurance proceeds was "so dire as to be unacceptable if a reasonable alternative is available."[2]

No wonder, then that *no one* – not petitioners, not any other class member, not any *amicus* – contests the basic economic fairness of this $1.535 billion three-way settlement.

Then why are we here? Petitioners argue that all of this talk of an overarching unitary insurance risk is beside the point either because it allegedly came out all right in the end in the

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[2] Petitioners' Brief at the Fifth Circuit as *Amici Curiae* in *Continental Casualty Co. v. Rudd*, Fib. App. 8a.

California appellate courts anyway[3] or because it was being resolved in an "entirely separate," "independent" case in California. Br. 1, 2 n.3, 16. They and their *amici* theorize about pretextual and ephemeral conflicts among class members and insist that each class member must have been permitted to liquidate his or her tort claim individually and, presumably, to litigate the availability of insurance to pay it.

Strikingly, however, nowhere in the proceedings considering the back-up trilateral agreement – whose approval called for certification of the *identical* non-opt-out class – did petitioners see any of these supposed intra-class conflicts. And this even though the record made it abundantly clear that, under the trilateral regime, the insurance fund – even augmented by Fibreboard's non-insurance assets – was likely to be woefully insufficient. CA 358a-359a, 362a-365a. Nor have petitioners ever objected to the certification of a mandatory non-opt-out class with respect to the trilateral agreement. Petitioners have *no* quarrel with the findings below that resolution of the coverage disputes required certification of a non-opt-out class of future asbestos claimants; they simply prefer the backup trilateral agreement – even though that agreement, as the District Court found and as petitioners do not seriously dispute, provides "at least hundreds of millions of dollars" less to the class and will likely leave tens of thousands of class members, for whom petitioners now gnash their due process teeth, without any prospect of recovery at all.

As shown below, there is absolutely no reason for this Court to leave class members to this risk. Settled law establishes that the class members were permitted to participate in the resolution of the insurance disputes that were so fundamental to their future well-being and with respect to which class members could have litigated directly against the insurers. Those disputes were properly and fairly resolved by

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[3] This is not even correct. The one favorable trial court ruling on the assignment issue was reversed in 1994 and could have easily led to a finding vitiating all of Continental's coverage. See JA 485a-504a; CA 231a, 379a-380a. *See, infra*, p. 7 n.5 Likewise, several of the policy construction issues have not yet been resolved. *See* Set. Def. Br. 15. nn.** & 16 n.*.

the *Ahearn* settlement, and the class is entitled to the benefits of that settlement.

I. THE FACTS AS FOUND OF RECORD

This settlement did not evolve - as petitioners and their *amici* would imply - from a few hours activity in the Judge's kitchen where Fibreboard and its insurers bribed a "hand-picked" group of venal plaintiffs' lawyers to perform their bidding and sell out their clients. Br. 4.

Fibreboard had long presented a unique problem for asbestos plaintiffs. Previously a significant manufacturer of asbestos products, it was liable for the asbestos-related injuries of tens of thousands of persons, CA 260a-261a, 265a, but had non-insurance assets sufficient only to fund pennies on the dollar to pay for their injuries. CA 42a, 277a.

The economic reality of Fibreboard's financial situation made it imperative for asbestos plaintiffs to chart a course designed to bring about as favorable a resolution of the insurance disputes as possible. *All* asbestos plaintiffs and *all* their attorneys – including petitioners' trial counsel – uniformly came to that conclusion, and acted on that basis for years preceding this settlement. CA 278a-279a, 285a-286a.

1. The "Structured Settlement Program"

In 1988, with the coverage litigation in its ninth year before the trial court, Fibreboard had largely exhausted its insurance from sources other than Continental and Pacific and had no resources of its own to pay asbestos judgments and settlements as they came to pass. CA 285a. It proposed a "structured settlement program" ("SSP"), under which asbestos plaintiffs would receive a partial payment up-front, with a promise to pay the balance of the settlement only when and if Fibreboard achieved a favorable resolution of the coverage litigation.[4] CA 277a-279a, 285a-288a. Recognizing that there was no prospect of obtaining immediate full payment from Fibreboard, and that the only chance of ever receiving full payment lay in cooperating with Fibreboard as it proceeded with the

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[4] The deferred payments would remain owed even if Fibreboard *lost* the coverage case, but everyone understood they would receive only a few cents on the dollar, at best, if that occurred.

coverage litigation in the hope of producing a favorable result, asbestos plaintiffs and all their counsel (including class counsel and petitioners' trial counsel) accepted these terms. CA 285a-287a.

2. The "assignment program"

By 1991, however, Fibreboard lacked the resources necessary even to make the partial payments called for under the SSP, and the coverage dispute remained nowhere near resolution. To allow it to proceed with the coverage litigation – as well as to pressure Continental toward the bargaining table – Fibreboard proposed to settle with asbestos plaintiffs by "assignment." CA 40a-41a, 285a-287a, 292a. Unlike the SSP, plaintiffs would receive *no* up-front cash payment from Fibreboard at all, but would instead receive an "assignment" of an agreed-upon amount of money under the disputed Continental policy, money the plaintiffs could collect from *Continental* when and if Fibreboard prevailed in the coverage disputes. CA 39a-41a, 285a-288a.

Again, the asbestos plaintiffs' bar uniformly agreed to these assignments for the same reasons as it had earlier agreed to the SSP, subject to two conditions. CA 39a-40a, 285a-288a. First, they demanded that the assignment settlement amounts be markedly higher than the previous settlement norms to reflect the lack of cash up front and the major delays and contingencies in receiving payment. CA 286a. Second, because the ultimate collection of the assigned amounts were subject to the additional risk that the assignments themselves were invalid under the Continental policy (which prohibited settlements without Continental's consent), or, worse yet, effected a forfeiture of any coverage, the plaintiffs' bar also required that Fibreboard obtain court orders validating its right to make the proposed assignments. CA 39a-40a, 285a-287a; JA 156a. Fibreboard first sought such an order in a case entitled *Andrus v. Fibreboard*, which was then pending in a California

trial court. CA 288a-289a. The *Andrus* trial court rejected Continental's objections to the "assignments." CA 289a-290a.[5]

3. Bankruptcy was not a viable option.

As is evident from their uniform acceptance of the SSP and "assignment" program, asbestos plaintiffs and their counsel, including petitioners' trial counsel, also reached a uniform decision that forcing Fibreboard into bankruptcy was not a constructive alternative. CA 78a, 376a. The reasons were simple. Bankruptcy would *not* have resolved the asbestos plaintiffs' central problem: the insurance disputes. Those disputes would have continued unabated (with the insurers continuing to deny coverage) – and so, for that reason, would the risk to the asbestos plaintiffs of non-recovery.[6] But while bankruptcy

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[5] Continental appealed the trial court ruling. Subsequently - after the Global Settlement was reached, but before the fairness hearing before the District Court - the California Court of Appeal reversed the *Andrus* trial court's order, establishing that the assignments were indeed in violation of the Continental policy. JA 485a-504a; CA 379a-380a. As the District Court found, Continental could now assert another major defense to coverage: in addition to all of the insurers' arguments in the coverage case itself, Continental would claim that Fibreboard's breach of the policy forfeited any coverage that might otherwise be held to exist. CA 52a, 231a, 379a-380a.

[6] In addition, there was also a substantial question whether bankruptcy even could be employed to resolve the claims of future asbestos plaintiffs. Before the 1994 enactment of sections 524(g)-(h) of the Bankruptcy Code, 11 U.S.C. §§ 524(g)-(h), it was unclear whether the Code permitted the discharge of future victims' claims, and indeed no court had held that the Code did so permit. *See In re UNR Industries, Inc.*, 29 B.R. 741, 745-46 (N.D. Ill. 1983) (future claims not "claims"), *appeal dismissed and mandamus denied*, 725 F.2d 1111 (7th Cir. 1984); *In re UNR Industries, Inc.*, 71 B.R. 467, 480-481 (Bankr. N.D. Ill. 1987) (future claimants are parties in interest but may not have dischargeable claims); *In re Amatex Corp.*, 37 B.R. 613 (E.D. Pa. 1983) (future claimants not creditors), *rev'd.*, 755 F.2d 1034, 1041-1043 (3d Cir. 1985) (future claimants are parties in interest but may not have dischargeable claims); *In re Johns-Manville Corp.*, 36 B.R. 743 (Bankr. S.D.N.Y. 1984) (future claimants are parties in interest but may not have dischargeable claims); *In re Waterman S.S. Corp.*, 141 B.R. 552 (Bankr. S.D.N.Y. 1992) (futures were claimants but not notified of bar date and so not

would not have changed the course of the insurance disputes, it would have brought the asbestos litigation against Fibreboard to a screeching halt by virtue of the automatic stay provisions, as it had done in all other asbestos bankruptcies, preventing both the orderly liquidation of claims against Fibreboard as they arose in the tort system against other defendants and the use of the assignment program as an ever-growing pressure point against Continental.

Indeed, so universal was the *rejection* of bankruptcy as a viable option by all asbestos plaintiffs and their counsel (again including petitioners' trial counsel) that as of August 1993, when the *Ahearn* settlement was being negotiated, Fibreboard could *not* have been forced into bankruptcy. Even though Fibreboard at that time had outstanding settlement obligations aggregating many times its non-insurance assets, by virtue of asbestos plaintiffs' uniform prior and continuing acceptance of the SSP and "assignment" programs, payment of Fibreboard's liquidated asbestos obligations continued to be deferred until *after* a resolution of the coverage litigation. CA 376a.

4. Negotiations for a "global" assignment settlement.

Although the "assignment" program permitted Fibreboard to survive, the coverage litigation continued unresolved. During early 1991, in order to raise the pressure still further on Continental, Fibreboard proposed the notion of a "global" class settlement by assignment, whereby asbestos claimants would look to an assigned $1 billion-plus amount of money from Continental if Fibreboard prevailed in the coverage case, and could have whatever was left of Fibreboard's non-insurance assets if it lost that case. CA 41a-42a, 292a-293a.

Fibreboard made this proposal to four members of the asbestos plaintiffs' bar. Two, Ronald Motley and Joseph Rice, were partners in the Ness Motley firm, a South Carolina firm that was involved nationwide in 50% of all asbestos claims and in virtually all major trials against Fibreboard. CA 293a, 388a-389a. The two others, Steven Kazan and Harry Wartnick, were

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discharged); *Locks v. U.S. Trustee (In re H. K. Porter)*, 157 B.R. 89, 97-99 (W.D. Pa. 1993) (future claims not "claims" for Chapter 11 liquidation).

asbestos plaintiffs' lawyers in Fibreboard's home state of California; they had been Fibreboard's main adversaries for years in a wide range of cases and the plaintiffs' bar considered them to be among the most knowledgeable attorneys with respect to Fibreboard's operations and liability profile from whom plaintiffs' attorneys solicited and followed advice in determining whether to accept Fibreboard's SSP and assignment programs. CA 277a-279a, 293a-294a. Mr. Kazan was the plaintiffs' counsel in the *Andrus* assignment settlement case. A global settlement had to involve these lawyers in order to be credible with the remainder of the plaintiffs' bar - and, more importantly, with any Court - a view that petitioners' trial counsel has acknowledged was correct. CA 293a-294a, 388a-390a; Fairness Hearing Transcript at p. 517.

For the same reasons that led all their colleagues in the asbestos plaintiffs' bar to accept Fibreboard's SSP and assignment settlements, these lawyers agreed to discuss Fibreboard's proposal. Negotiations proceeded during 1991-92.[7] CA 291a-294a. By the end of 1992, however, it was apparent that no deal could be reached, largely because neither side could devise any mutually acceptable method for dealing with the impact of potential opt-outs from a class and, thus, how to price a non-unitary settlement. CA 300a-301a.

5. Negotiations with Continental begin – and fall apart.

Although no global assignment settlement could be reached, in late 1992 Fibreboard and the Ness Motley firm did enter into a single assignment settlement of all that firm's clients' claims against Fibreboard, more than 20,000 claimants

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[7] To prepare for negotiations, counsel secured the expert assistance of the renowned epidemiologist, Dr. William Nicholson, who had previously made the most accurate forecasts of the incidence of asbestos-related disease, to project the number of future claims against Fibreboard (CA 295a-296a); hired an investment banker to evaluate Fibreboard's financial position (CA 295a); and engaged the law firm of Caplin & Drysdale, which had extensive asbestos experience but which did not represent individual asbestos claimants, to work with them and to assist with the complex procedural, insurance and tax issues that were relevant to the negotiations. CA 294a.

for more than $200 million. CA 42a, 302a-303a. Fibreboard then filed suit against Continental in the District Court, seeking the requisite order validating that settlement. CA 303a.

In February 1993, Continental announced publicly that it was prepared to negotiate an overall coverage resolution, but only on a global basis that would resolve all of its Fibreboard asbestos exposure. CA 304a. Following that announcement, at a status conference in the assignment action, the District Court suggested and all parties agreed to the appointment of Circuit Judge Patrick E. Higginbotham as a mediator. CA 43a, 304a-305a.[8]

In April 1993, Continental made an offer of $2 billion without interest payable over 25 years to settle all pending and future Fibreboard asbestos claims on a non-opt-out class basis. CA 312a. This offer – which on a present value basis was approximately one-third the amount of money that the insurers eventually agreed to pay – was summarily rejected and, because of its patent inadequacy, class counsel declined to make a counter-proposal and declared the negotiations to be at an end. *Id.*

Judge Higginbotham ultimately advised the parties that his observation of the negotiations and of the parties' dealings had convinced him that the impasse was due in large part to the parties' attempt to that point to include both pending and future claims within the class. CA 316a-317a. He viewed such a combined class as "too complex" to hold out a prospect of agreement, and suggested that the class settlement encompass only future claims, with Continental first settling pending claims separately. CA 316a-317a. In that way, the settlement values established for the pending claims could be used as a benchmark for pricing the class settlement of future claims. CA 316a-317a. Moreover, cases were then being filed and settled at such a rapid rate that neither Fibreboard nor class counsel could be comfortable with an accurate tabulation upon which to value the present cases as part of an overall settlement. JA 81a-82a, 238a-239a.

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[8] In these discussions, and in the negotiations that followed, Mr. Motley was replaced by Joseph Cox, another Ness Motley partner.

Class counsel saw great advantage to the class in this "futures-only" approach. Most of the pending claims had already been the subject of "assignment" settlements done without Continental's participation and the nominal value of these assignment settlements was higher than the prior established settlement norm. CA 64a, 286a. Thus, for Continental to settle these pending claims, it would have to negotiate a final settlement amount off inflated "assignment" values. The approach suggested by Judge Higginbotham therefore offered the opportunity to see the pending claims settled at high amounts due to the inflated "assignment" values, and then for class counsel to insist that the class of future claimants had to receive the same high amounts. As the District Court found, this "leveraging up" of the class's recovery proved to be exactly what transpired. CA 407a.

6. Class-wide settlement negotiations resume.

By August 9, 1993, the large Ness Motley assignment settlement had been renegotiated with Continental and approved by the District Court. Judge Higginbotham then recommended that the District Court designate Messrs. Cox, Kazan, Rice and Wartnick to negotiate a potential "futures" settlement and the District Court did so. CA 66a-67a, 320a.

With the potential final coverage case argument 18 days away, class counsel were confronted by the following circumstances: Fibreboard and Continental had consistently been unable to settle the insurance dispute on their own over the course of 14 years of litigation, even in situations of maximum pressure to do so. They had not settled either when the coverage case went to the trier of fact or when the assignment program or even the global assignment negotiations were underway; nor did they come any closer just a few weeks earlier in June 1993, when the impasse in global settlement discussions prompted them to make one more attempt at a bilateral settlement. CA 313a-314a.

Fibreboard was unwilling to accept any amount in settlement that would not provide it with the benefit of sufficient insurance to cover its entire asbestos exposure together with the costs of defending the claims in the tort system: for Fibreboard, a settlement short of that goal was

little better than losing the coverage case, as it would simply lead to insolvency a little later. CA 374a-375a. Conversely, Continental was unwilling to offer anything approaching Fibreboard's demand for to do so would require paying essentially all that it would have had to pay if it lost the coverage case. CA 43a-44a, 52a, 272a-276a, 307a. Absent closure with plaintiffs, the amount of the claims and the cost of their defense loomed very large to Fibreboard when it reviewed offers from Continental, just as did the prospect to Continental of direct claims against it from plaintiffs who obtained judgments against a Fibreboard without funds.[9]

The stakes were very high. To class counsel, based on advice from their experts and their analysis of future claims projections and then current settlement values, a settlement of $1.5 billion in cash would be acceptable, but not less. CA 328a. Accordingly, on August 22, but five days before the scheduled final coverage argument, class counsel rejected a cash offer of $1.3 billion from the insurers as insufficient. CA 326a-327a. The next day, in an effort to bring closure, the insurers presented their "final" offer of $1.5 billion. CA 327a. In an endgame attempt to maximize the settlement amount, even this offer was rejected. CA 328a. Negotiations continued throughout the day preceding the coverage argument, and late into the evening of August 26, 1993. CA 328a-329a. With the coverage appeal to be argued in less than 10 hours, and satisfied that the insurers and Fibreboard had offered all they were willing to put on the table, agreement in principle was reached to the insurers' and Fibreboard's final price term offer of $1.535 billion in cash. CA 328a-329a.

Because of the gravity of the insurance coverage risk, as further protection for the class, class counsel insisted as a term

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[9] Petitioners' sole effort to deal with this reality – that, as the District Court found, the coverage dispute could be settled "only" through a "unitary resolution" involving the class (CA 232a, 241a, 374a-375a) – is a mischaracterization of a few lines from the extensive testimony of Fibreboard's counsel at the fairness hearing, taken out of context. *See* Set. Def. Br. 19 n.*. The same counsel testified that Fibreboard and Continental were never even close to resolving the dispute together, JA 76a-77a, as did Continental's counsel. JA 225a-227a, 293a-294a.

of any settlement that the insurers and Fibreboard agree to what they could not agree before: a separate trilateral settlement of the coverage dispute among Fibreboard and its two insurers to operate as a "back-up" in the event that the class settlement were successfully challenged (the "Trilateral Agreement"). CA 329a-330a. Fibreboard objected to this condition because the insurers declined to pay any more for future claims under a Trilateral Agreement than the same $1.525 billion they had agreed to pay for those claims under the class-wide settlement,[10] CA 330a, which to Fibreboard was far from sufficient to cover its entire asbestos exposure together with the costs of defending all plaintiffs' claims in the tort system. CA 362a-365a.

On August 27, 1993 – on the same afternoon as the coverage appeal was being argued – Fibreboard at last conceded this point because *and only because* class counsel made it clear that they would not otherwise enter into the class-wide settlement, and because *and only because* the Trilateral Agreement was simply to be a "back-up."[11] The parties then announced to the District Court that agreement in principle had been reached on the basic terms of a class-wide settlement (the "Global Settlement"). CA 329a-331a.

Although the "back-up" Trilateral Agreement now ensures that the coverage dispute will not proceed even if the Global Settlement is not approved, it does not eliminate the risk posed to the class by the coverage dispute. CA 358a-359a, 361a-366a. As both lower courts expressly found, the Trilateral Agreement

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[10] The insurers did agree to pay an additional $475 million under the trilateral agreement to cover claims of "unsettled presents" – persons who had already filed lawsuits against Fibreboard, but who had not settled or gone to judgment. These claims were to be resolved by the insurers separately outside the class-wide settlement.

[11] The record and findings are crystal clear that Fibreboard relented and agreed to the Trilateral Agreement *only* as the price to secure the Global Settlement. CA 329a-330a; JA 84a, 111a-112a. Petitioners' assertion before this Court that "[t]he Global Settlement was not necessary to overcome [the] stumbling block[s]" to a Trilateral Agreement (Br. 9 n.9) is without any factual basis whatever.

would provide far less money to the class than does the Global Settlement, and will likely leave an enormous number of class members without any compensation at all. CA 358a-359a, 361a-366a. Set. Def. Br. 19-21. In particular, the District Court *specifically* rejected petitioners' assertion here that "the monies in the Trilateral Agreement would be sufficient" to pay all class members "indefinitely, perhaps forever" (Br. 9), relying on the same Fibreboard statements that they invoke here. CA 358a-359a Instead, the District Court found that the *complete* record demonstrated that the class will receive "hundreds of millions of dollars less" under the Trilateral Agreement than under the Global Settlement, and that "there is a significant risk that the Trilateral Settlement (even augmented by Fibreboard's non insurance assets) would leave a 'late comer' component of the [class] without compensation." CA 359a, 361a-362a. This conclusion was supported by Fibreboard's counsel who testified that for Fibreboard to stay viable under the Trilateral regime it would somehow have to reduce existing settlement values in half, and, in the process, spend more than half the funds on defense costs. JA 87a-89a, 123a.

It took Fibreboard and the insurers until October 12, 1993, weeks after the announcement of the agreement in principle, to reach a definitive Trilateral Agreement. CA 332a-335a. It was only then that the parties began to turn their tentative agreement in principle into a definitive Global Settlement. CA 335a. The ensuing negotiations included, in particular, lengthy negotiations of the "Trust Distribution Process" ("TDP"), the procedures by which individual class members would obtain resolution and payment of their claims. CA 335a-336a, 346a; JA 723a-766a. These negotiations took months, and were not finally completed until December 23, 1993, when the parties signed a definitive, written Global Settlement. CA 335a-336a; JA 626a-793a.

II. THE GLOBAL SETTLEMENT

Under the Global Settlement, $1.535 billion from the insurers and Fibreboard is channeled to a Trust established to administer and pay individual class members' claims. JA 632a-634a; CA 49a, 331a. The Trust is managed by three independent trustees, two selected by representatives of the class members

and the third selected jointly by Fibreboard and the insurers. JA 709a-710a; CA 49a.

The Global Settlement does not itself liquidate or set the amount of any individual class members' claim, nor does it deny compensation to any claim for which Fibreboard could otherwise be held liable in the tort system. Instead, it only establishes a fund out of which claims may be speedily and efficiently paid – while at the same time preserving injured persons' ultimate right to resort to the tort system. CA 50a, 346a; JA 725a-727a. Under the TDP, as in the tort system, a claimant first presents the Trust with certain basic information: medical diagnoses, conditions of exposure to Fibreboard asbestos and financial data. JA 728a. Unlike the tort system, the Trust *must* then make a settlement offer to the claimant in an amount based upon all historically relevant individual characteristics of the claim revealed by the information provided by the claimant. JA 730a, 765a-766a. Unlike the settlement invalidated by this Court in *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997), the TDP does *not* constrain the claimant's recovery by setting ranges of settlement values for particular diseases, by prohibiting inflation adjustments or by denying recovery altogether for certain claims.

If the claimant and the Trust do not reach a settlement, non-binding mediation and arbitration (binding or non-binding, at the claimant's election) ensue. CA 346a; JA 731a, 734a-736a. If non-binding arbitration fails to produce an agreement, and following a settlement conference with a district judge or the judge's representative, if the claimant still remains unsatisfied, he or she may then file suit against the Trust in the tort system. JA 736a-741a. In such a suit, recovery is limited to the same $500,000 overall limit as applies to consensual resolutions with the Trust, punitive damages and interest may not be recovered against the Trust and claims are limited to Fibreboard's several share of liability. JA 749a, 753a-754a.

In all cases, to maximize the amount of money that class members' actually receive, plaintiffs' attorney's fees are limited to 25% of the client's settlement, after recovery of costs, far below the norm in the tort system. JA 761a. Paralleling results in the tort system – where, in most major jurisdictions,

asbestos plaintiffs must wait at least three to five years after filing cases before their claims are resolved – claims resolved by agreement are paid over three years; claims that are tried may be paid over a longer interval. CA 346a; JA 747a-748a. Finally, through "spendthrift provisions" limiting the Trust's assets that can be paid out in any given year to annual income and an aliquot portion of principal, the TDP provisions seek to protect assets so that they will be equally available to compensate class members whose injuries develop in the future. CA 347a; JA 748a-749a, 762a-764a. In the event that current settlement obligations in any year exceed these "spendthrift" limits, payments are prioritized so that the sickest claimants are paid first, with any unpaid amounts carried over to the next year. JA 745a-747a.

Petitioners have *never* challenged the substantive fairness of the Global Settlement as a whole. Instead, they complain about a few extremely limited terms in isolation, ignoring the class's need to enter into a settlement to avoid the enormous risk posed by the coverage disputes. They complain that the $1.535 billion settlement amount includes only $500,000 directly from Fibreboard and does not include the approximately $235 million of Fibreboard's remaining equity. Br. 7. However, the class's concern is not who pays the money but whether the amount is enough. Indeed, where a tort defendant has insurance coverage, the settlement payments routinely come from the insurer and not from the defendant itself. That is why people buy insurance. The proper question is thus whether the $1.535 billion settlement figure is fair – and petitioners do not contest the lower courts' findings that it is.

Equally immaterial are the outer limits on recovery against the Trust that petitioners protest. The District Court expressly found that each of these derived – not from any attempt artificially to limit class members' recovery – but from a desire that the TDP reflect historical recoveries against Fibreboard under the tort system so that a few windfall awards would not prematurely exhaust the Trust's assets. CA 372a-373a. For example, the $500,000 cap on recovery reflects the facts that (a) of the more than 100,000 claims settled by Fibreboard prior to the Global Settlement, only 12 individual settlements exceeded

$500,000, and (b) $500,000 is the maximum amount payable to each claimant under the insurance policies to which claimants had to look for payment. CA 373a. The prohibition on punitive damages against the Trust reflects the fact that, with possibly one $40,000 exception, Fibreboard *never* paid punitive damages in the tort system.[12] CA 372a; JA 93a.

In short, unlike many settlements where class members receive a small fraction of their damages, or under the Trilateral Settlement where half the funds would be spent on transaction costs, the outer limits on recovery here, as the District Court found, are "small" and "not significant," and should have at most a minimal impact in practice on what individual class members actually receive. CA 372a-374a. Apparently, petitioners would have had the class roll the dice in the coverage dispute to avoid these minimal limits. Common sense directed otherwise.

SUMMARY OF THE ARGUMENT

Petitioners' litany of arguments all boils down to one thing. Class members – as a matter of their own rights, no less – could do nothing to protect themselves against the risk of the coverage dispute. They had to sit helplessly on the sideline while Fibreboard risked and potentially lost their only source of meaningful recovery; they simply had no alternative.

The source of this purported rule of law, however, is as unclear and elusive as its impact would be harmful to the class. Although petitioners invoke a wide variety of legal doctrines, they assiduously avoid relating any of them to the actual facts of this case. Instead, their brief is a series of generalized

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[12] Unlike certain other asbestos defendants, it has traditionally beenvery difficult for plaintiffs to establish a case for punitive damages against Fibreboard. CA 261a. The District Court also made express findings regarding the minimal effect of the remaining outer limits on recovery, finding that the elimination of interest against the Trust reflects the fact that claims will be resolved far faster and far less expensively to the plaintiff than the tort-system norm and that the limitation to several liability in suits against the Trust reflects the fact that the overall settlement amount (and hence the recoveries class members should receive) *already* reflects Fibreboard's potential joint-and-several share of other asbestos defendants' liability. CA 372a-374a.

statements of law strung together with an effort to rewrite the facts so as to equate this case with the totally different class settlement invalidated in *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997).

1. Petitioners' principal argument is essentially a contention that, because the *Amchem* class action settlement did not meet the requirements of Rule 23(a), the Global Settlement necessarily fails to do so as well. This totally ignores the fundamental differences between this case and *Amchem*: the existence here of the coverage disputes and each class member's identical need to participate in an action that favorably resolved them. Indeed, petitioners eventually concede that the class in this case did have sufficiently common claims and interests to have participated in a class resolution of the coverage disputes. Br. 16. Their ultimate argument then reduces to a contention that these concededly common claims and interests were somehow not pleaded artfully enough in the complaint (Br. 16-17.), a contention that both mischaracterizes the complaint and, in any event, supplies no adequate reason for this Court to throw out an indisputably fair $1.535 billion settlement and put tens of thousands of class members back at grave risk. 2. Likewise, petitioners' main Article III argument consists of a collection of irrelevant boilerplate about how a "feigned," non-adversarial suit does not meet the Case or Controversy requirement. Br. 47-48. They totally fail to explain how the parties here – who have been on opposing sides in litigation for almost two decades, and who obviously have conflicting interests as to whether, how much and by whom class members' claims get paid – can possibly be deemed non-adversarial. Their argument that this case is "feigned" because the parties did not intend to litigate the personal injury claims alleged in the complaint (Br. 45-46) is simply a reprise of their contention that the class's claims with respect to the insurance disputes – which were clearly the central focus of this settlement – were inadequately pleaded.

In substance, petitioners' argument is that the "exposure-only" class members do not have sufficient "injury" to participate in the class settlement here. This argument is meritless. The exposure-only group of class members would

be, if anything, among those *most* injured by a continuation of the coverage disputes (or by operation of the back-up Trilateral Agreement), since whatever funds might be available would likely be long exhausted before the physical diseases of many of them become manifest. The notion that they cannot participate in a class action whose entire purpose is to resolve this risk in order to protect their ability to recover for injuries they will subsequently develop flies in the face of all precedent. Indeed, the time for these class members to act to protect their rights was in 1993 when the settlement was reached – not years later when their physical diseases appear, but when the source of recovery might no longer exist.[13]

ARGUMENT

I. THE COURTS BELOW CORRECTLY DETERMINED THAT THE PREREQUISITES OF RULE 23(a) ARE MET.

A. Legal Framework

Rule 23(a) states four threshold requirements applicable to all class actions, three of which petitioners contend are not met in this case: (a) commonality: "questions of law or fact common to the class"; (b) typicality: the "named parties' claims or defenses [must be] 'typical of the class'"; and (c) adequacy of representation: the "representatives 'will fairly and adequately protect the interests of the class.'" *Amchem*, 117 S. Ct. at 2245 (quoting Fed.R.Civ.P. 23(a)). As this Court has described these three requirements:

> The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the

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[13] The remainder of petitioners' arguments concerning Rule 23(b)(1)(B), due process and notice are addressed in the brief filed by the settling defendants, and will not be separately discussed here.

> adequacy-of-representation requirement, although the latter requirement also raises concerns about . . . conflicts of interest.

General Tel. Co. v. Falcon, 457 U.S. 147, 157 n.13 (1982).

In assessing whether these requirements are met with respect to a class action settlement, moreover, the settlement should be taken into account. As this Court held in *Amchem* – rejecting the Third Circuit's contrary view that the settlement must be ignored for that purpose – "settlement is relevant to a class certification," "is a factor in the calculus," and it is "altogether proper" to take the settlement into account in determining whether the Rule 23(a) requirements are met. 117 S. Ct. at 2248, 2249. As to the weight to be given a settlement, *Amchem* held only that the fairness of a settlement may not be used to replace the Rule 23(a) and (b) requirements through the shortcut rule "that if a settlement is 'fair,' then certification is proper." *Id.* at 2249.

B. The Fundamental Differences Between This Case And *Amchem*.

Petitioners' efforts to demonstrate that the courts below erred in concluding that the class meets the Rule 23(a) requirements rest almost entirely on an attempt to portray this case as a carbon copy of *Amchem*. As the Fifth Circuit determined, this portrayal consists of a remarkably superficial recount of the two cases.

1. *Amchem* involved a class settlement resolving the claims of "hundreds of thousands, perhaps millions of individuals" having in common nothing beyond "past exposure to asbestos products manufactured by one or more of 20 companies." *Amchem*, 117 S. Ct. at 2237. No reason was offered why these persons had any need for a class resolution of their claims: in particular, no contention was made that class members would lack an adequate source of recovery if permitted to continue to proceed over time with individual actions. *See id.* at 2249 n.19. Instead, class certification was sought under Rule 23(b)(3) not on the basis of class members' needs, but rather (as in Rule 23(b)(3) class actions generally)

simply upon claims of increased "systemic efficiency" over individual adjudications in the tort system. *Id.* at 2246.

This notwithstanding, the settlement did "'more than simply provide a general recovery fund'" for class members' benefit; it instead made "essential allocation decisions designed to confine compensation and to limit the defendants' liability," decisions that "necessarily favor[ed] some claimants over others." *Id.* at 2243, 2251 (quotation omitted). For example, the *Amchem* settlement apportioned "individual damages" by specifying a range of damages payable for each disease type. CA 58a & n.8; *see Amchem*, 117 S. Ct. at 2240. The settlement did not provide for inflation adjustment of these ranges, and imposed "case flow maximums" capping the number of claims payable for each disease in a given year. *Amchem*, 117 S. Ct. at 2240. And it extinguished a wide variety of claims without any compensation at all, even if those claims were otherwise recognized under applicable state law. *Id.*

Finally, "[c]lass members, in the main, [were] bound by th[is] settlement in perpetuity, while [the] defendants [could] choose to withdraw from the settlement after ten years." *Id.* at 2241. A "back-end" opt-out right, whereby a class member could exit the settlement and sue in the tort system upon the subsequent manifestation of injury, was limited to a "small number of class members – only a few per year." *Id.* In brief, this Court held that the *Amchem* settlement impermissibly took a class of persons with virtually no common interests and no common need for a class resolution, and imposed upon them a class-wide resolution of a host of matters on which their interests sharply diverged.

2. The Global Settlement in this case is different on every level. CA 2a-3a, 57a-58a & nn.7-8. Class members here shared – not simply past exposure to a single defendant's asbestos products – but also the "real and enormous" risk arising from Fibreboard's coverage disputes. CA 76a. *All* class members "faced the real possibility" that an adverse decision in the impending appeal in the coverage litigation would render Fibreboard "insolvent simply on the basis of claims already settled" and leave them no source of recovery whatever. CA 75a. *All* class members accordingly shared an

"identical" need for a class resolution to avoid this risk. CA 3a, 57a-58a.

As the Fifth Circuit found, the class resolution in this case was thus "undisputedly driven" – not, as in *Amchem*, by a search for alternatives to the tort system – but by this common and overriding need of the class. CA 75a, 57a-58a. Class certification was accordingly predicated not on Rule 23(b)(3), but on the very different provisions of Rule 23(b)(1)(B), which provides for class treatment where class members' pursuit of individual actions would create a risk of prejudice to other class members' claims. CA 2a, 72a-85a.

Critically, as the Fifth Circuit put it, while the Global Settlement resolves the risk to class members by providing an enormous and unquestionably fair amount of "money and an equitable distribution process," it does not "award damages to individual victims" or "make any determination" of the "amount" of money to which they are entitled, and it does not deprive class members of the right to control their individual claims. CA 57a-58a, 85a, 50a. Unlike the *Amchem* settlement, it sets no ranges of recoveries for particular diseases and makes "no allocation or difference in award, according to nature or severity of injury"; individual recoveries will instead be subsequently determined on an "individual" basis as they arise through non-binding proceedings with the Trust, which will consider all historically relevant individual factors and circumstances. CA 2a, 49a-50a, 57a-58a & n.7, 337a, 346a. And if individual claimants are dissatisfied with their proposed recovery for any reason, they have an absolute "back-end" right to litigate their claims in court, with the Trust substituting for Fibreboard as the defendant. CA 50a, 58a n.7, 346a.

The Global Settlement, in marked contrast to *Amchem*, thus: involved a class sharing an overriding common interest "regarding insurance coverage for the class's injuries and establishment of an equitable distribution process"; resolved only those "commonly held questions"; and did not resolve the matters – what each class member will actually recover – as to which class members' interests may differ. CA 57a-58a & n.8; *see also* CA 2a-3a.

As set forth below, the courts below correctly determined that these critical factual and legal distinctions between *Amchem* and this case totally belie petitioners' attempt to equate the two.

C. Commonality and Typicality

Petitioners make essentially two arguments with respect to the Rule 23(a)(2) and 23(a)(3) commonality and typicality issues. First, by dint of selective quotation from the Fifth Circuit's opinions, petitioners claim that the Fifth Circuit has refused to apply *Amchem's* holding that the commonality and typicality requirements cannot be satisfied simply by reference to the class's interest in obtaining a favorable settlement. They further argue this refusal has thus so "tainted" the Fifth Circuit's conclusion that those requirements were met in this case as to require reversal. Br. 13-15. Second, petitioners contend that the insurance disputes that are at the heart of this case are, in essence, irrelevant because those disputes were the subject of other cases and were not adequately pleaded in this case. Br. 15-18.

Petitioners' first contention is based on a mischaracterization of the Fifth Circuit's decision. As described above, the Fifth Circuit's initial opinion in this case repeatedly noted the class's common interests in resolving the risks to all class members presented by Fibreboard's insurance disputes (*see, e.g.*, CA 57a-59a & n.8, 75a-76a). On remand, the Fifth Circuit incorporated its prior discussion of the common interests of the class by reference. CA 2a-3a. Because the insurance disputes, and the class's interest in eliminating the risks arising therefrom, indisputably pre-existed the settlement, the Fifth Circuit did not reject *Amchem* in relying on them.

In any event, the issue before this Court is whether the record below supports the findings of the District Court, affirmed by the Fifth Circuit, that the Rule 23(a)(2) and (a)(3) requirements were met by the class here.

1. As petitioners do not and cannot dispute, all class members had existing or potential future claims against Fibreboard arising out of their exposure to its asbestos

containing products, all class members were identically at risk of no recovery from Fibreboard as a result of the coverage disputes, and all had identical claims that the insurers owed coverage notwithstanding those disputes. Given this, the class's contentions and interests are clearly sufficiently "interrelated" (*General Tel. Co., supra*) to meet the commonality requirement.[14]

Likewise, the claims of the named representatives that the class is entitled to the benefit of Fibreboard's insurance proceeds notwithstanding the coverage disputes are "typical" of the claims of the rest of the class. Each class member faced an identical risk from a continuation of the coverage disputes, that each class member's existing or future personal injury claim against Fibreboard would be identically worthless if Fibreboard were to lose that dispute. Each class member thus had an identical claim that the insurers owed coverage notwithstanding the coverage dispute, and an identical stake in an action designed to protect their common interests under the policies. These claims, moreover, could have been litigated by the class absent the Global Settlement: under California law, which governs the California insurance policies at issue here, tort plaintiffs have a cognizable interest in a tort defendant's insurance policies, and may bring an action even prior to obtaining a judgment on their tort claims in order to establish that an insurer owes coverage on any liability they may establish.[15]

Unlike in *Amchem*, moreover, these common and typical claims and interests "preexist[ed]" the Global Settlement, and do not arise from the settlement itself. *Amchem*, 117 S. Ct. at

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[14] Compared with the "predominance" requirement of Rule 23(b)(3) at issue in *Amchem* – which does not apply to this Rule 23(b)(1)(B) case (*see Amchem*, 117 S. Ct. at 2249 n. 19) – the commonality requirement is "far [less] demanding." *Id.* at 2250.

[15] *See, e.g., Omaha Indem. Co. v. Superior Court*, 258 Cal. Rptr. 66 (Cal. App. 1989); *General Ins. Co. of America v. Whitmore*, 45 Cal. Rptr. 556 (Cal. App. 1965); *see also Horace Mann Ins. Co. v. Barbara B.*, 846 P.2d 792, 795 (Cal. 1993); *Shapiro v. Republic Indem. Co.*, 437 P.2d 289 (Cal. 1959).

2249. The class's common interests in resolving the coverage disputes to ensure a source of recovery arose long before the Global Settlement was negotiated. This is not a case like *Amchem*, where the settlement resolved issues as to which class members had very little in common beforehand, and the settling parties then tried to bootstrap their way past the predominance requirement by positing the "settlement's fairness" and class members' generic interests in receiving "fair compensation" as "common" questions. *Id.* at 2249.

2. Petitioners ultimately do not contest any of this. Indeed, they expressly concede that "perhaps the class could have" participated in a class "settlement" of the coverage dispute. Br. 16. Instead, they assert that this conceded commonality and typicality somehow does not suffice because of an alleged pleading inadequacy: they insist that the complaint does not specifically plead claims to secure insurance coverage, that the complaint's repeated allegations regarding the coverage dispute and the risk it posed to the class are "mere background," and that the "*only* claims pleaded are garden variety asbestos personal injury, money-damages claims." *Id.* (emphasis in original).

This, to begin with, simply misrepresents the complaint. The entire complaint (which may be found at CA 552a-566a) is replete with claims regarding the injury posed to all class members by a continuation of the coverage disputes and the class's need for a favorable resolution of those disputes through a class settlement. On any fair reading, the complaint alleges that Fibreboard is liable for the class's present and future injuries; that, as a result of the coverage disputes, Fibreboard may not have any money to pay class members; that the continuation of these disputes thus places class members at great risk; and that favorable resolution of the coverage disputes on a class basis is necessary to remedy that risk in order to ensure class members of a source of recovery.[16]

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[16] *See, e.g.*, CA 558a-559a (¶ 18: "Fibreboard's assets are so limited . . . that Fibreboard cannot pay, absent insurance proceeds, all future asbestos-related claims. Recovery by earlier litigants will likely exhaust Fibreboard's available and projected assets, and would, as a practical

And although Fibreboard's insurers were not initially parties defendant, they became so on the very day the complaint was filed by moving to intervene. CA 567a-570a.

Petitioners' real argument here is not, ultimately, over alleged deficiencies in the class complaint – which could, after all, be cured by amendment of the pleadings if necessary.[17] Rather, their contention is that the class representatives – no matter how the complaint is pleaded – cannot settle "future" claims because they allegedly "by definition" could not assert such claims in the District Court when the complaint was filed. Br. 14 n.10. This argument reduces to the contention that class actions can *never* include future claims, contrary to settled law

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matter, substantially impair the ability of later claimants to obtain relief"; ¶ 22: "Absent indemnification from Continental or Pacific, Fibreboard is likely to be rendered insolvent by pending asbestos litigations, and unable to compensate Class members for asbestos-related injuries"; ¶ 24: "Unless Fibreboard settles its coverage disputes in a manner that ensures indemnification for asbestos claimants against Fibreboard, there is a substantial risk that Fibreboard will be rendered insolvent and asbestos claimants against Fibreboard will be left with no relief whatsoever".)

[17] The class could have recited a slightly different complaint producing exactly the same outcome, seeking a declaratory judgment that the insurers owed coverage on the class's claims notwithstanding the coverage dispute. There is no question that the class would have standing to litigate such a claim, both under governing California law and the Declaratory Judgment Act, 28 U.S.C. § 2201. *See* cases cited at p. 24 n.15, *supra*; *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941); *Cincinnati Ins. Co. v. Holbrook*, 867 F.2d 1330, 1332-33 (11th Cir. 1989). There is also no question that certification of a non-opt-out class would be appropriate on that claim: the class would have a strong and unitary interest in the insurance policies and the outcome of the coverage dispute; and that interest would have to be litigated on a mandatory class basis either under Rule 23(b)(1)(B) – because individual adjudications of the coverage issues would be dispositive of the class's claims – or under Rule 23(b)(2), which provides for a non-opt-out class in declaratory judgment cases where the judgment would be generally applicable to the class. Indeed, this Court has the power to deem the complaint here amended in this fashion. *See* p. 45 n.33, *infra*; *Chandler v. Miller*, 117 S. Ct. 1295, 1300 n.2. (1997).

permitting the class or representative adjudication and settlement of claims of future schoolchildren, future prisoners and unborn heirs. *See* p. 50 & nn.36 & 37, *infra*. The argument also flies in the face of this Court's decision in *Matsushita Elec. Ind. Co. v. Epstein*, 116 S. Ct. 873 (1996). In *Matsushita*, this Court held that class representatives in fact *can* – as part of an overall settlement of claims properly before the court – settle claims that were not only not pleaded in the complaint, but over which the forum court could not have asserted jurisdiction even if the claims had been pleaded.

Petitioners' attempt to distinguish *Matsushita* as involving a case where the two sets of settled claims "arose from the identical factual predicate" (Br. 14 n.10) is unavailing. The nexus here between the class's claims for a determination of their rights to Fibreboard's disputed insurance – which petitioners concede the class could have litigated and settled on a class basis (Br. 16) – and the class's future personal-injury claims against Fibreboard is if anything *closer* than the nexus among the claims at issue in *Matsushita*. Indeed, so interrelated are the two sets of claims that the class's claims with respect to Fibreboard's disputed insurance could *not* have been settled without simultaneously settling the class's future personal-injury claims against Fibreboard that the disputed policies were claimed to insure - the insurance proceeds could not be turned over by the insurers to the class without Fibreboard's consent, and Fibreboard was not about to supply that consent while leaving intact the tort claims against it that the insurance would otherwise potentially have covered. In essence, under the *Ahearn* Global Settlement, the class is agreeing to trade its ability to sue Fibreboard on future personal-injury claims in return for an assured source of recovery out of the disputed insurance – and is doing so because Fibreboard's necessary consent to that settlement could not otherwise be obtained and because without that settlement the class might well find itself without any source of recovery at all. Petitioners are entirely silent as to what rule of law prevents the class from doing so.

3. Petitioners also contend that typicality does not exist because class members allegedly have diverse interests on

matters *not* affected by the Settlement, such as the import of individual circumstances (*e.g.*, differences in state law and exposure history) bearing on the amount of damages each individual class member will ultimately receive. Br. 17-18. As the Fifth Circuit correctly pointed out, however, the Global Settlement – unlike the settlement in *Amchem* – does not resolve the effect of these variations in individual circumstances. CA 57a-58a & n.7. Those circumstances will instead be considered fully by the Trust, in accord with their demonstrated significance in the tort system, when it makes settlement offers to individual claimants; and individual class members who may disagree with the Trust's assessment of their individual circumstances retain an absolute "back-end" right to litigate the effect of those circumstances in the tort system under applicable state law.[18]

There is absolutely no support for petitioners' notion that alleged atypicality regarding these matters *not* resolved by the Settlement precludes class certification as to the matters that the Settlement does resolve and as to which typicality does exist. To the contrary, this Court's repeated statements in *Amchem* that a settlement should be considered in assessing

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[18] Petitioners' contention that the *Amchem* settlement likewise did not resolve individual damages badly mischaracterizes that settlement. Their assertion that the *Amchem* settlement did not "pre-ordain the amounts to be awarded" (Br. 17) is correct only in the most literal sense. Although the settlement did not delineate a specific dollar amount that each specific class member would receive, it set ranges of compensation for each disease type and provided that class members could get immediate recovery only if they agreed to accept the very bottom end of the range. *Georgine v. Amchem Prods. Inc.*, 157 F.R.D. 246, 276, 337 (E.D. Pa. 1994), *rev'd*, 83 F.3d 610 (3d Cir. 1996); *see Amchem*, 117 S. Ct. at 2240. And the settlement greatly limited the back-end opt-out right to only a "few" class members "per year," so that dissatisfied claimants would generally have no other option. 117 S. Ct. at 2241. The Global Settlement here, by contrast, sets no recovery ranges for any disease type, and the across-the-board $500,000 outer limit it does set is for recovery from a single defendant (as compared with the 20 defendants covered by the *Amchem* settlement) and reflects demonstrated historical tort-system realities for claims against that defendant. *See* pp. 16-17, 22, *supra*.

class certification mean precisely that a settlement class need satisfy the commonality and typicality requirements only with respect to those matters actually resolved by the settlement, and that courts assessing a proposed settlement class thus "need not inquire" into matters *not* resolved by the settlement. *Amchem*, 117 S. Ct. at 2248 (holding that the Rule 23(b)(3)(D) inquiry, which focuses on whether a class action would be manageable if tried, may be ignored in the settlement context).[19]

D. Adequacy of Representation

Petitioners, joined by an *amicus* group of self-proclaimed "Scholars," next contend that class counsel inadequately represented the class. Unsurprisingly, in positing a host of theoretical conflicts under which class counsel supposedly labored, neither petitioners nor the Scholars bother to relate their abstract theories to the actual facts of this case.[20] And it is these actual facts that demonstrate that the lower courts did not abuse their discretion in determining that class counsel adequately represented the class.[21]

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[19] Consideration of the settlement in this way is analogous to the provision of Rule 23(c)(4) that classes generally – including those certified for litigation – may be partially certified as to certain common issues, so long as the class resolution does not resolve individual issues and instead leaves them for future individualized resolution.

[20] Curiously, the Scholars open their discussion by conceding that the Settlement is fair, Sch. Br. at 9, but then proceed to make a variety of unsupported assertions that class counsel who in fact negotiated the Settlement had no "bargaining leverage" because they did not intend to try the case. *Id.* at 3, 23, 24. The Scholars conveniently ignore the undisputed reality that the class counsel had ample bargaining leverage provided by their ability, in the absence of a settlement with Fibreboard and the insurers, to continue to litigate individual cases against Fibreboard (for which they then accounted for some 50 percent of the total (CA 388a)) or to litigate on a class basis, if desired, the coverage disputes, see pp. 24, 26 n.17, *supra*.

[21] The courts have uniformly held that district court determinations that no subclasses were necessary and that counsel adequately represented the class are reviewable only for abuse of discretion. *See, e.g., In re Prudential Insurance Co. Sales Agent Practice Litig.*, 1998

1. The alleged conflict between currently injured and exposure-only class members.

Petitioners' primary contention reduces to the notion that because there was a conflict between currently injured and exposure-only class members in *Amchem* (*see* 117 S. Ct. at 2250-51), there must also be one here. The contention is without merit.

1. In *Amchem*, this Court rendered – not a categorical holding that currently injured and exposure-only class members may never coexist within the same class – but a decision that the particular background and terms of the settlement in that case created a conflict. *See* 117 S. Ct. at 2251. This Court held that the *Amchem* settlement terms gave rise to a conflict in that case because they imposed "essential allocation decisions designed to confine compensation and to limit defendants' liability." *Id.* In particular, the two groups had conflicting interests regarding the *Amchem* settlement's provisions prohibiting the adjustment of the ranges of recoveries for inflation, drastically limiting the number of back-end opt-outs and extinguishing certain causes of action for no compensation. *Id.* Indeed, in perhaps the clearest demonstration that it was not categorically precluding exposure-only and currently injured plaintiffs from coexisting

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WL 409156 (3d Cir. 1998) at * 23; *Twelve John Does v. District of Columbia*, 117 F.3d 571, 575 (D.C. Cir. 1997); *Clark Equipment Co. v. International Union, Allied Indus. Workers*, 803 F.2d 878, 880 (6th Cir. 1986). *Compare Califano v. Yamasaki*, 442 U.S. 682, 703 (1979). (In *Amchem*, this Court did not address the issue of the standard of review because – unlike here – it was reviewing an appellate court decision that itself reversed the district court's determination.) The Scholars' argument for *de novo* review on the ground that adequacy of representation is a constitutional right proves far too much. Since a fair trial is also a constitutional right, *de novo* review of trial court rulings that allegedly made a trial unfair would be required in every case. Furthermore, even in constitutional cases, trial court findings of fact are reversible only for clear error. *Freeman v. Pitts*, 503 U.S. 467, 474 (1992); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 534 (1979); Rule 52a, Fed.R.Civ.P. In any event, for the reasons given below, the lower courts' decisions were correct under any standard of review.

within the same class, this Court cited approvingly the Second Circuit's decision in *In re Joint Eastern & Southern Dist. Asbestos Litig.* 982 F.2d 721 (2d Cir. 1992), *modified on reh'g sub nom. In re Findley*, 993 F.2d. 7 (2d Cir. 1993) ("*Findley*") – a case which approved a Rule 23(b)(1)(B) settlement class containing both groups without establishing separate subclasses. *See Amchem*, 117 S. Ct. at 2251.

2. Here, an equivalent focus on the actual facts of this case illustrates that the conflict identified in *Amchem* never arose. First, exposure-only and currently injured class members have a community of interest here that was totally absent in *Amchem*. Unlike the *Amchem* settlement – which, as noted above, was not necessitated by any common need of the class – the Global Settlement was "undisputedly driven" (CA 75a) by all class members' identical and overriding need to "avoid[] the potentially disastrous results of a loss by Fibreboard in the Coverage Case appeal." CA 56a, 415a. Currently injured and exposure-only class members therefore shared an identical need for a unitary class resolution to eliminate this risk: otherwise, the claims of both groups against Fibreboard would potentially be equally worthless. Rather than creating internal conflicts, the Global Settlement's principal provisions – securing over $1.5 billion of disputed insurance coverage to compensate the class – thus greatly benefitting all class members, exposure-only and currently injured alike. CA 76a, 421a. Indeed, presumably for this reason, petitioners nowhere dispute that the interests of both groups of class members were aligned as to the truly overriding issues in this case: whether to enter into a global settlement to resolve the risk posed by the coverage disputes, and whether the $1.535 billion Global Settlement amount is an acceptable price.

Second, the record further reflects that the class's undisputed common interest in successfully resolving these overriding common concerns would have been jeopardized by the interjection of the host of separate subclasses that petitioners now demand. Given the "severe deadline" (CA 67a) of the impending appeal in the coverage litigation, the settlement negotiations were charged with a "sense of

urgency," and all parties "were driven to reach a settlement before" that appeal could be heard. CA 45a. As the District Court expressly found, injection of subclasses representing special interests to fight over largely theoretical side issues over allocation of a (then-hypothetical) source of recovery would have imperiled the ability to resolve the coverage dispute prior to the decision of the coverage appeal, thereby jeopardizing the existence of a source of recovery in the first place and subjecting the entire class to a "substantial and potentially devastating risk." CA 404a, 413a-414a, 67a.

Third, the Global Settlement resolves these matters of overriding common concern to the class without including any of the aspects of the *Amchem* settlement found to create a conflict in that case (*see Amchem*, 117 S. Ct. at 2251):

- Unlike the *Amchem* settlement, the Global Settlement does not invite trade-offs between various groups of class members by fixing different amounts to be paid for any particular category of claims; instead amounts payable for individual claims are to be set by the Trust in response to all factors that are relevant in the tort system. JA 730a, 765a-766a.
- Unlike the *Amchem* settlement, there are no limits on the number of class members who can exercise "back-end" opt-out rights to litigate their claims in the tort system. If claimants are dissatisfied with the Trust's evaluation of their individual claims, they can bring those claims to court and (subject to relatively inconsequential limitations discussed below) recover any amount to which they can establish entitlement under applicable law. JA 737a-739a. As the Fifth Circuit recognized, this prospect will ensure that the Trust fully takes developments in the tort system into account in administering claims. CA 58a n.7.
- Unlike the *Amchem* settlement, there is no prohibition on inflation adjustment of settlement recoveries. The Trust may fully consider such an adjustment – and, as noted above, the prospect of being sued in the tort system will give it strong incentive to duplicate the effect of inflation in that system.

- Unlike the *Amchem* settlement, no set of claims are resolved without compensation. Any claim may be presented to the Trust, to be assessed according to all relevant factors applicable to that claim in the tort system, and litigated in the tort system by the claimant if necessary under applicable state law.

By contrast, petitioners and their supporting *amici* are able to conjure up a conflict argument here based only upon hypothetical outer limits on recovery, principally a limit of $500,000 per claim and a prohibition on punitive damages against the Trust. Br. 19; Sch. Br. 17; TLPJ Br. 10. But as detailed above, as the District Court found and as petitioners do not contest, unlike the artificial payment ranges in *Amchem*, the limits reflect demonstrated historical realities in the tort system in suits against Fibreboard, and should thus have at most a minimal impact in practice on what class members actually receive. *See* p. 16-17, *supra*; CA 372a-374a. Moreover, these relatively minor outer limits are clearly appropriate to ensure that a small number of unpredictable wild-card awards in suits against the Trust do not create a disproportionate drain on a Trust corpus that is not large enough to guarantee recovery for all claims that may be asserted against it over a large number of years. And since, by definition, no individual class member can know whether it would be his or her claim that would receive such an unpredictable wild-card award, the limitation affects all class members equally.

3. The actual record in this case thus exposes the extreme and unsupportable nature of petitioners' and the Scholars' argument. They are maintaining that – even where all class members' interests are fully aligned as to the central decision of whether to settle for the proffered amount – the existence of any hypothetical conflict about the allocation of that amount bars certification of the class as a whole: no matter how trivial that conflict may be in the context of the entire case, no matter how unlikely it may be that the hypothetical conflict will actually arise, and no matter how much subdividing the class into balkanized segments would imperil a successful resolution of those issues of overriding common concern to the class. For example, petitioners in

effect contend here that, because a few unknown and unidentifiable currently injured class members might hypothetically, against all demonstrated odds, recover more than $500,000 or punitive damages from Fibreboard *if* the coverage disputes were resolved favorably, the entire class had to be left at risk that all of the coverage might be lost because of the practical impossibility of creating subclasses and appointing new counsel for them in time to achieve a settlement.[22]

Surely the District Court did not abuse its discretion in rejecting this argument. In fact, the argument would potentially invalidate virtually every class action settlement. Class actions almost always settle for an amount less than 100% of what class members would have recovered had they been totally successful in litigation: that is why they are settlements. These settlements thus of necessity require some measure of allocation among class members of the settlement amount. As a result, different factions of the class frequently have differing interests concerning the allocation of damages, but that fact has never prevented cases from being settled on a class-wide basis. *See, e.g., In re "Agent Orange" Prod. Liab. Litig.*, 800 F.2d 14, 18 (2d Cir. 1986) (intraclass conflicts over the allocation of a settlement amount are "not unusual"); *Walsh v. Great Atlantic & Pac. Tea Co.*, 726 F.2d 956, 964 (3d Cir. 1983).

For example, in securities fraud cases – where the general propriety of class-wide settlements is settled – class members who purchased stock during certain parts of the class period could often argue that they are entitled to a disproportionate

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[22] Implicitly, in turn, the absence of these limits on recovery would have created a similar "conflict" as well, since exposure-only class members would by hypothesis have had an equal complaint that the limits should have been included. Indeed, it was on the basis of such theoretical conflicts that petitioners' expert witness at the fairness hearing insisted that the District Court – with 18 days remaining prior to the coverage appeal argument – needed to divide the class into no fewer than *eight* separate groups, separately represented by eight lawyers, none of whom would have had any involvement in the negotiations to that point. JA 326a-327a.

share of the class's recovery.[23] Creative objectors can undoubtedly conjure up multiple similar "conflicts" in almost every class case. These hypothetical, tangential fights over allocation of a settlement amount should not prevent certification of the class as a whole, so long as the class's common interests outweigh the differences over allocation and the proposed settlement fairly accommodates all class members – lest classes lose the important ability to proceed as a group because of some theoretical argument over allocation that pales in significance to their community of interest overall. *See, e.g., In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1435-36 (2d Cir. 1993); *In re "Agent Orange" Prod. Liab. Litig.*, 800 F.2d at 18-19; *Blackie v. Barrack*, 524 F.2d 891, 908-10 (9th Cir. 1975).

Moreover, as little basis as petitioners' argument has generally, it has even less in the context of this case. Petitioners' claimed currently injured/exposure-only conflict equates to a supposed conflict between those who would win a race to the courthouse in the absence of a settlement and those who would not. To hold out *that* purported "conflict" as disabling, however, makes absolutely no sense in the context here: a class settlement under Rule 23(b)(1)(B). Although the adequacy of representation requirement applies fully in Rule 23(b)(1)(B) cases, the inquiry must be informed by the type of class certification at issue. As its language makes clear, Rule 23(b)(1)(B) calls for a unitary class resolution in the relatively rare circumstance in which allowing individual class members to maintain "separate actions" on their own would "as a practical matter" prejudice other class members' claims. In particular, Rule 23(b)(1)(B) class actions involving so-called "limited funds" will generally reflect a substantial degree of tension within the class based on who might otherwise have gone to judgment first and potentially received a disproportionate recovery. *See, e.g., Findley, supra.* Yet a

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[23] *See, e.g., Blackie v. Barrack*, 524 F.2d 891, 908-10 (9th Cir. 1975); *Tucker v. Arthur Andersen & Co.*, 67 F.R.D. 468, 481-82 (S.D.N.Y. 1975). *See also* Amicus Brief of National Association of Securities and Commercial Law Attorneys at 9-10.

major purpose of the Rule is precisely to avoid prejudice to the class as a whole based on such a race to the courthouse, and class actions under it and its historical predecessors have thus traditionally been resolved on a unitary basis. CA 81a-84a; Advisory Committee Note to 1966 Amendment to Rule 23(b)(1)(B), 39 F.R.D. 100-02 (1966). *See* Set. Def. Br. 34-46. The reason is that, in those cases involving monetary claims to which the Rule applies, the class shares a common and overriding interest – to secure and equitably distribute otherwise potentially unavailable funds among all class members, early and late claimants alike.

On petitioners' argument, then, the very predicate of many Rule 23(b)(1)(B) class actions – that the winners of a race to judgment would inequitably prejudice the interest of others – would simultaneously be grounds for a disabling intraclass conflict based on the claim of some class members to preferential treatment because of their asserted ability to win that race. This cannot be. Accordingly, this Court expressly distinguished Rule 23 (b)(1)(B) cases on this point in *Amchem*. 117 S. Ct. at 2251.[24] And it cited with approval a case in which the Second Circuit held that, in a Rule 23(b)(1)(B) setting, a conflict requiring subclassing arises between exposure-only and currently injured class members only if the latter have some "legally enforceable rights" to "a priority payment" – something that the currently injured class members do not have here. *See Findley*, 993 F.2d at 10-11.[25]

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[24] Petitioners maintain that this Court's language in *Amchem* suggests instead that the supposed conflict is "exacerbated" in the Rule 23(b)(1)(B) context. Br. 18. Although in fairness, *Amchem*'s language is not entirely clear on this point, it is submitted that – given the clear incompatibility of Rule 23(b)(1)(B) class actions with conflicts based on a race to the courthouse, and this Court's careful efforts elsewhere in *Amchem* to limit its holding to Rule 23(b)(3) classes – petitioners' reading should be rejected.

[25] Petitioners attempt to distinguish *Findley* as irrelevant on the grounds that their rights to immediate payment arise from state law, and not a negotiated plan. Br. 18 n.14. However, petitioners wholly fail to cite any law purporting to create recovery priorities among tort victims (other than the Rules Enabling Act, 28 U.S.C. §2072, which clearly does not so provide). *See* Set. Def. Br. 44-47.

4. Finally, even if there were a disabling conflict between the currently injured and exposure-only class members over allocation of the settlement amount, the appropriate remedy would be for the Global Settlement's allocation process (the TDP) to be renegotiated with subclasses. Because no one contends that the two groups had conflicting interests regarding whether to settle and the appropriateness of the $1.535 billion settlement amount, the alleged "conflict" cannot be a reason to throw out the entire Settlement. (This, in fact, was the position taken on this point by the dissenting judge below. CA 148a.) Petitioners' sole response – that, in *Amchem*, this Court voided the class certification after finding an intraclass conflict over allocation without remanding for further proceedings (Br. 20 n. 16) – ignores the fact that the Court had also determined that the class in that case also failed the Rule 23(b)(3) predominance requirement, and thus could not be certified regardless of whether subclasses were required to negotiate the allocation of the settlement amount. *See* 117 S. Ct. at 2250.

2. The remaining alleged conflicts

The remaining conflicts alleged by petitioners and the Scholars are equally without basis.

1. Petitioners briefly contend that, because the insurance policies did not originally cover claims based on first exposure after 1959, there is a conflict between class members whose first exposure to asbestos was before 1959 and those whose first exposure came thereafter. Br. 21. This contention simply ignores intervening factual developments that rendered this historical distinction obsolete and immaterial well before the Global Settlement was negotiated.

First, in 1992, Fibreboard had entered into a separate settlement with Pacific that would have provided Fibreboard with substantial funds to pay post-1959 claimants. Under this agreement, Fibreboard would have released the Pacific policy for potentially hundreds of millions of dollars, contingent upon

the outcome of the coverage case; and Fibreboard then could use those funds to pay post-1959 claims.[26] CA 416a.

Second, in April 1993, prior to any global settlement negotiations among all the parties, Continental and Fibreboard separately agreed that the total cost of any global settlement that was reached would be borne entirely by the insurers, including as to post-1959 claimants. As the District Court found, this agreement mooted the source of this claimed conflict, by requiring that the insurers pay fair value for all claimants in any global settlement, regardless of date of first exposure. CA 416a-418a, 71a.

These two agreements both did away with any real claim by pre-1959 claimants to a disproportionate share of any global settlement fund, and also gave both groups of class members the same overriding interest in a class resolution of the coverage dispute: a fact further demonstrated by petitioners' decision not to object to the Trilateral Agreement, or to demand subclasses or separate counsel in the *Rudd* case, even though the Trilateral Agreement likewise provided insurance funds that could be utilized by Fibreboard to pay both pre-1959 and post-1959 claims equally. CA 417a.[27]

2. Petitioners' and the Scholars' contention that class counsel had a conflict arising out of their prior settlement of "present" cases (Br. 22; Sch. Br. 20-23) likewise ignores the factual record. They blithely assert that these settlements made 50% of the proceeds "contingent on approval of a class settlement in this case"; that class counsel thus "owed it" to their present clients "to reach *any* class settlement"; and that – despite their implicit concession that the Global Settlement

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[26] This agreement never took effect because the amount payable under it was contingent upon receipt of an order cutting off claims by Continental against Pacific for contribution (CA 284a), and the agreement was superseded by the Global Settlement before the appropriateness of such an order was determined by the court.

[27] In any event, like the purported currently injured/exposure-only conflict, this alleged "conflict" extends only to the allocation of the Global Settlement fund – not to the decision to settle in the first place or to the overall size of the settlement amount.

is fair to the class – this "necessarily hampered" counsel in negotiating the Global Settlement. Br. 22 (emphasis in original).

The full facts are quite different. As related above, the suggestion that class counsel settle their present cases before negotiating the Global Settlement came from Judge Higginbotham, and it served to benefit the class. *See* pp. 10-11 *supra*. Moreover – contrary to petitioners' statement that the 50% contingency in these present settlements would have been satisfied by a global class settlement "on any terms whatsoever, even if those terms were unfavorable to the class" (Br. 6 (quotation omitted)) – that contingency would not have been satisfied unless the global settlement were approved as fair by the courts.[28] As the District Court found, far from creating a conflict, this provision thus gave class members and the present claimants an identical interest in a fair global settlement that would withstand judicial scrutiny. CA 406a-407a, 67a. And finally, the present settlements made 50% of the proceeds contingent – not simply upon a fair class settlement – but upon any favorable resolution of the coverage case (including a direct settlement between Fibreboard and the insurers or a Fibreboard victory in litigation). In that way, these settlements were identical to the SSP and assignment settlements that *all* asbestos plaintiffs' counsel had been entering into with Fibreboard for years. *See* pp. 5-6, *supra*. On petitioners' theory, then, all of these lawyers would have been conflicted, and the only counsel that could have been selected

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[28] Petitioners' and the Scholars' assertion that class counsel "owed", "had a duty" and "had an obligation" to the clients for whom they had settled cases prior to negotiating the Global Settlement (Br. 22; Sch. Br. 20, 21) to attempt to secure payment of the contingent 50% balance of those settlements by negotiating a separate class settlement for a wholly different group of persons is an *ipse dixit* unsupported by any authority, evidence of record, or common sense. Once those settlements were negotiated with payment provisions contingent on future litigation (or settlements) to which those clients were not parties, class counsel's representation of those clients was complete and they owed no further duty to those clients, much less a duty to undertake the representation of a class of other persons for the benefit of those former clients.

to represent the class – with just weeks remaining before the coverage case appeal – were those who had never been involved in asbestos litigation and thus had no familiarity with either Fibreboard's potential asbestos exposure or its complex insurance disputes. JA 306a-309a, 330a-333a, 336a-340a. Such a substitution would have inflicted grossly inadequate representation on the class, to its likely substantial detriment. CA 67a, 401a-404a.

3. Finally, petitioners (briefly) and the Scholars (at length) contend that class counsel were inadequate because they allegedly "gerrymandered" the class to include only future claimants. Br. 22, Sch. Br. 15-20. This contention, however, appears nowhere in the petition for writ of *certiorari*, was not raised or addressed in the courts below, and accordingly is not properly before this Court. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 533 (1992); S. Ct. Rule 14.1(a).

Moreover, the Scholars' assertion, without reference to or support in the record, that the reason for the exclusion of "presents" from the class was "to protect class counsel's own financial interests and the financial interests of other asbestos lawyers" in breach of class counsel's fiduciary duties, Sch. Br. 19, is both wrong and offensive.

First, notwithstanding petitioners' and the Scholars' contentions that class counsel concurrently negotiated on behalf of both their existing clients and the *Ahearn* class, the record is clear that, at the suggestion of Judge Higginbotham acting as a mediator, the Ness Motley settlement was negotiated to a conclusion before the negotiations that ultimately led to the Global Settlement commenced on August 9, 1993.[29] CA 407a-408a. Similarly, prior to August 27, 1993,

[29] While there were prior negotiations between class counsel and Fibreboard in 1991 and 1992 over a possible class assignment settlement and some preliminary discussions that included Continental in the spring of 1993 about a presents and futures global settlement, the record is clear that the only serious negotiations of the *Ahearn* settlement began in August of 1993. CA 300a-301a, 311a-314a, 320a-322a. *See* pp. 9-11, *supra*. Moreover, there is – and can be – no contention that the terms of the settlement of present claims were more favorable than the terms of the Global Settlement. CA 408a (uncontested District Court finding that the two are "roughly equivalent").

Fibreboard and Continental had settled numerous pending cases with other asbestos plaintiffs counsel. CA 315a-316a. All those cases having been settled, there was no reason for the parties to include them in a class consisting, by definition, of claims not yet settled.

That leaves the relatively small group of persons, not represented by class counsel, who had pending cases against Fibreboard on file in the courts.[30] That group was actually included within the prospective class negotiations until, following Judge Higginbotham's recommendation, class counsel finally determined not to include it in the class because they could not price a settlement that included a then rapidly moving target of present claims. CA 316a-317a, 326a-327a.

While the Scholars wax eloquent about the alleged breach of fiduciary duty on the part of class counsel in excluding this group from the *Ahearn* class, they nowhere explain (i) how either the group or the *Ahearn* class was hurt by its exclusion, (ii) what improper financial motivation class counsel could have had for excluding the clients of other lawyers from the class, and (iii) how class counsel can have had a fiduciary relationship with persons represented by lawyers other than themselves. Finally, in positing no legitimate rationale for the exclusion of pending cases from the *Ahearn* class (Sch. Br. 15), the Scholars also ignore the issues under the Anti-Injunction Act, 28 U.S.C. § 2283, that would have

[30] The exclusion from the class of those persons who had previously settled with Fibreboard subject to "cancer waivers" about which the scholars complain (Sch. Br. 16-17) was simply a function of the parties' definition of what were settled cases and, so far as the record shows, was not in any way based on some perceived financial benefit to class counsel or any other asbestos plaintiffs lawyers whose clients those persons had previously been. Moreover, other persons who had previously sued Fibreboard but had dismissed their claims and, like those who received "cancer waivers", retained the right to sue Fibreboard in the future upon the development of an asbestos-related disease are included in the class (JA 688a) despite being as likely to have a lawyer as the holders of "cancer waivers".

been presented by any attempt by the settling parties to enjoin the prosecution of cases pending in the state courts, which constituted the bulk of the unsettled cases excluded from the class. *See* CA 582a. Here, as everywhere else, the Scholars have ignored both the record in this case and the practical impact on the class of their theoretical arguments.

II. THIS CASE SATISFIES THE REQUIREMENTS OF ARTICLE III.

A. The Live And Adversarial Disputes Among The Parties Satisfy The "Case or Controversy" Requirement.

Petitioners contend that the settlement here violates Article III of the Constitution because "[i]n this case, there was no justiciable controversy *at any time*." Br. 48. This argument is based on a mishmash of false or misleading assertions that the parties were "friendly" not "adversarial" (Br. 47, 48) and that the action in which the settlement was entered was "feigned", a "pretext" and a "sham" (Br. 44, 45, 46). Petitioners make these assertions notwithstanding the undisputed facts that when this action was filed the class members here unquestionably had more than $1 billion worth of future claims against Fibreboard based on existing exposure to its asbestos containing products that were recoverable only out of insurance coverage disputed by Fibreboard's insurers, and even though Fibreboard and its insurers had been aggressively litigating these insurance disputes against one another for decades.

1. The Article III "case" or "controversy" requirement is met where an action involves "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937). Article III thus requires that a federal action affect "tangible legal rights" and "touch[ ] the legal relations of parties having adverse legal interests." *ASARCO v. Kadish*, 490 U.S. 605, 619 (1989); *Aetna*, 300 U.S. at 240-41.

Here, the class, Fibreboard and the insurers had indisputably "adverse legal interests" as to whether, how much and by whom class members' future claims arising out of their existing exposure to Fibreboard's asbestos-containing products would get paid. The class's complaint accordingly alleges that the members of the class were injured by exposure to Fibreboard's asbestos products and that, absent the proceeds of Fibreboard's claimed insurance, they cannot be compensated; Fibreboard's answer denies the tort claims; and the insurers' answer and counterclaims deny that coverage is owed to Fibreboard and, thus, available to the class members. Indeed, petitioners have conceded that the class in fact could have litigated these very contentions consistent with Article III by "seeking a declaration of the plaintiffs' rights under those policies and any settlement thereof." Br. 16; *see Aetna*, 300 U.S. at 242-44 (action brought by an insurer for a judgment that no coverage was owed in the face of demands for provision of coverage met Article III requirements); *Truck Ins. Exch. v. Ashland Oil, Inc.*, 951 F.2d 787, 789 (7th Cir. 1992) (Posner, J.) ("an insured's tort victim . . . has a legal right to protect his potential interest in the policy . . . that will support standing under Article III").

Nor was there was anything "hypothetical" about these disputes; to the contrary, they were actually being litigated at the time of the filing of this action, and would have continued to have been litigated absent the settlement in this case.[31] Equally so, the judgments of the courts below affect each party's "tangible legal rights" at issue in these disputes: those judgments provide class members with an enormous amount

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[31] Contrary to petitioners' insinuations about the settlement being a "contrivance among friends" (Br. 47), the negotiations leading up to the Global Settlement were marked by the same level of adversity among the parties. Without a shred of factual support, petitioners simply announce that the negotiations took the form of a "choreographed" proceeding among Fibreboard and "several cooperative plaintiffs' lawyers." Br. 44. This assertion is categorically at odds with the factual findings of the courts below. CA 327a-330a, 335a-336a, 347a-348a. Thus, petitioners' reliance on *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055 (1997) (Br. 47-48), is wholly misplaced.

of money from Fibreboard and the insurers to compensate them for their injuries, and in turn release Fibreboard and the insurers from further liability as to those injuries.

2. Petitioners do not dispute any of this. Instead, their derision of this case as a "feigned proceeding" and a "sham" (Br. 44, 46) derives principally from one thing: they contend that the indisputably real controversy among the parties was transformed into an unconstitutional "charade" (Br. 46) in violation of Article III because the "negotiations [of the settlement] involved not the resolution of *existing* legal claims for *actual* injuries, but the establishment of an elaborate ADR process to take control of *future* asbestos claims against Fibreboard." Br. 44-45.[32]

Petitioners base their contention that the settlement here affects primarily class members who "have no injuries and no ripe legal claims" (Br. 44) on their insistence that (i) the only claims of injury asserted in the complaint on behalf of the "exposure-only" majority of class members were for fear of cancer, enhanced risk of developing cancer and medical monitoring, (ii) those claims neither could nor were intended to be actually litigated, and (iii) the settlement provided no specific redress for those claims, Br. 45.

The fallacy of this contention – which is based on a mischaracterization of the complaint as pleading the coverage disputes only as "mere background" – has already been demonstrated at pages 24-26, *supra*, in connection with petitioners' identical arguments concerning the commonality

[32] Petitioners are clearly wrong in characterizing this settlement as creating a compelled alternative dispute resolution system that deprives them of their day in court. The settlement offer negotiation process established by the TDP, including non-binding mediation and arbitration, is ultimately consensual because if, in the prosecution of an individual claim, a class member is dissatisfied with the results of that process, he or she has an absolute right to sue the Trust in the tort system. JA 728a-741a.

and typicality requirements of Rule 23(a).[33] Petitioners' additional contention that the class could not have litigated the insurance disputes because they were the subject of other lawsuits – the coverage litigation in California and the *Rudd* action before Judge Parker – (Br. 46) simply ignores the facts that (i) the class was not a party in the coverage case and (ii) the *Rudd* action was brought *after* the *Ahearn* case and was based on the back-up insurance settlement that was itself a condition of the *Ahearn* settlement.

Petitioners also mysteriously assert that this case violates Article III because the relief in this action "'does not remedy the injury suffered'" by the exposure-only class members. Br. 47 (quoting *Steel Company v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1019 (1998)). We are simply at a loss to understand this statement. This action ensures that funds will be available to these class members to compensate them when their diseases do become manifest. Without this

[33] Petitioners also attempt to refute respondents' demonstration that any jurisdictional or other problems arising from any perceived failure of the complaint to adequately plead the class's claims with respect to the insurance disputes could be remedied by deeming the pleadings amended to cure such defects pursuant to Rule 15(b), Fed. R. Civ. P., and 28 U.S.C. ¶ 1653 by contending (i) that these claims were not "litigated" at the fairness hearing and (ii) that, in any event, those claims would not justify the settlement of the class members' "entirely *different*" personal injury claims against Fibreboard. Br. 46 n. 40. As to the first point, petitioners misconstrue respondents' argument, which is not that the insurance disputes were actually litigated at the fairness hearing, but rather that this Court can look to the fairness hearing for the purpose of ascertaining that the controversies that drove the settlement were the risks to the class posed by the continuation of the insurance disputes (for which causes of action could have been pled in the complaint) - a subject that was exhaustively examined at the fairness hearing. *See, e.g.*, CA 272a-276a. As to the second point, as shown at p. 27, *supra*, the class members' need to obtain Fibreboard's consent to an insurance settlement which captured the insurance proceeds for the class and not Fibreboard (unlike *Rudd*) justified their agreement to release Fibreboard from their personal injury claims which, contrary to petitioners, are not being "extinguishe[d]" but are rather being directed against the Trust in Fibreboard's stead.

action, the exposure-only class members would be, if anything, among those most injured by an unfavorable outcome of the coverage disputes. It is obvious that this action remedies this injury.

Ultimately, it appears instead that petitioners are trying to distort this Court's straightforward statement in *Steel Company* of the redressability component of standing – that an action must "remedy the injury *suffered*" – into the totally different proposition of an Article III bar on actions where the relief eventually awarded does not remedy the particular injury that was alleged in the *complaint*. Br. 45-47. They insist that this case violates Article III because the Global Settlement allegedly offers no relief for the "only" injuries supposedly pleaded in the complaint by exposure-only class members: "fear of cancer," increased "risk" of cancer and "medical monitoring" expenses. *Id.* This argument is not only flawed legally for the reasons set forth above, it has no basis in the facts of this case. Petitioners' bald assertion that the Global Settlement precludes recovery for risk or fear of cancer and medical monitoring (Br. 45) is simply false: the TDP makes quite clear that *any* claim, whether for a currently manifest disease or not, may be presented to the Trust; the Trust is then to determine whether the claim is compensable based on the principles of the applicable state law, and the claimant may sue the Trust in court if dissatisfied with that determination. JA 728a, 730a-731a, 737a-738a, 765a-766a.

3. Because of the stream-of-consciousness character of petitioners' Article III arguments, respondents are unsure whether petitioners are also reiterating the contention they made in the Fifth Circuit (which not even the dissent accepted) that the Global Settlement violates Article III simply because the parties negotiated and reached an agreement in principle on a settlement before the filing of the complaint, and the action was then "filed to obtain judicial approval of [the] settlement" rather than for litigation. Br. 45.

Rather than burdening the Court with a response to an argument petitioners appear not to be genuinely pressing, respondents would simply refer the Court to the rebuttal of

this contention contained in the brief in opposition to the petition filed herein by the insurers. *See* Ins. BIO 28-29.[34]

Moreover, the essential premise for any such argument by petitioners is lacking because the only "settlement" agreed to by the parties prior to the filing of the complaint in this case was the August 27 agreement in principle establishing a $1.535 billion price for the Global Settlement and requiring the negotiation of the back-up Trilateral Agreement. Most of the details of the Global Settlement – including the entire TDP – had not even been discussed, let alone agreed upon at that time; and other major conditions precedent to a formal agreement also remained to be satisfied, including the documentation of the back-up Trilateral Agreement. The lengthy, often bitter negotiations on these prerequisite matters all took place after the filing of the complaint. *See* CA 334a-336a; p. 14 *supra*. This Court has squarely held that tentative settlement agreements do not divest federal courts of Article III jurisdiction. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 465 n.3 (1978).

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[34] Petitioners' sole effort to distinguish *Swift & Co. v. United States*, 276 U.S. 311, 326 (1928), and the other consent decree cases relied on in the insurers' opposition, is the *ipse dixit* that the consent-decree context is different because the government would have supposedly instituted litigation had the decree not been entered, whereas in this case litigation supposedly would not have ensued absent the Global Settlement. Br. 47 & n. 41. The first of these assumptions is entirely speculative: petitioners obviously have no way of knowing whether the government in a particular case would have assumed the burden of a formal filing absent a consent decree, and neither *Swift* nor any of the cases following it relied on any such certainty as part of their rejection of the interpretation of Article III expoused by petitioners. The second of petitioners' assumptions, by contrast, is flatly false: as the District Court found in its very first finding of fact (CA 248a), litigation among the parties most definitively would have ensued absent the Global Settlement, if not under this precise complaint then in another form. Petitioners also assert, without any analysis at all, that the rule should be different where (as in consent decree cases) the federal government is involved. This Court, however, has rejected any relaxation of Article III where the government is a party. *See, e.g., Muskrat v. United States*, 219 U.S. 346, 361-62 (1911).

B. The Exposure-Only Class Members Have Injury-In-Fact.

Petitioners' final Article III contention is that the exposure-only class members lack injury-in-fact because they allegedly have no cause of action under "the substantive tort law of most states" to recover money damages now, before their diseases become manifest. Br. 48. In other words, petitioners assert that Article III bars these class members from doing anything to protect their undeniable interests in Fibreboard's insurance policies until their diseases actually surface years down the road – by which point, of course, the potential insurance may have been lost.

This focus on whether exposure-only class members could recover money damages immediately misses the point entirely. As the Fifth Circuit recognized, but as petitioners consistently fail to perceive, the purpose of this action was not to recover individual damages for class members now, but instead to protect their rights under the insurance policies to ensure the availability of funds when they do develop indisputably compensable diseases. CA 85a.[35] This case thus "does not purport to make any determination of the validity or amount of" exposure-only class members' claims; instead, it "address[es] the immediate and important controversy of whether [they] will be able to receive compensation for their injuries before Fibreboard runs out of money." *Id.*

Accordingly, the issue is not whether exposure-only class members had a cause of action for money damages as of the filing of the complaint, but whether they had standing to act then to protect their rights under the insurance policies and their future ability to recover against the immediate threat posed by the coverage dispute (or by implementation of the "inferior" back-up Trilateral Agreement). As the courts below recognized – and as petitioners apparently concede (Br. 16) – they plainly did.

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[35] As set forth above – and as petitioners appear to concede – it is clear that all class members had a cause of action under applicable California law to sue to protect their interests under Fibreboard's insurance policies. *See* p. 24, *supra*.

For example, this Court upheld a far more attenuated assertion of standing by exposure-only plaintiffs in *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59 (1978). There, persons exposed to radiation from nuclear power plants sought immediate invalidation of a federal statute limiting the potential liability of the nuclear power industry in the hypothetical event of injuries arising from a nuclear accident, alleging that the statute's absence might discourage the power plants' owners from continuing the plants' operation, which in turn might reduce their risk of developing a radiation-related disease. *Id.* at 72-75. This Court stated squarely that the exposure to radiation, unaccompanied by present illness, constituted injury-in-fact "given our generalized concern about exposure to radiation and the apprehension flowing from the uncertainty about the health and genetic consequences [of such exposure]." *Id.* at 74. If these exposure-only plaintiffs had standing because this string of contingencies might result in diminution of a risk that one or more of them might eventually develop diseases, the exposure-only class members here thus assuredly had standing to participate in an action that would protect them from the immediate concrete risk of the coverage dispute.

For this reason, lower courts have held that exposure-only asbestos claimants and future potential beneficiaries of disputed insurance policies have Article III standing to sue to protect their sources of recovery. *E.g., In re UNR Industries, Inc.*, 20 F.3d 766, 770 (7th Cir. 1994); (Easterbrook, J.); *Truck Ins. Exch. v. Ashland Oil, Inc.*, 951 F.2d 787, 789 (7th Cir. 1992). *See also In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1434 (2d Cir. 1993).

Any other approach would be completely inconsistent with settled law permitting future claimants to sue immediately as part of class or representative actions to protect rights that will ripen in the future. Future schoolchildren thus are regularly included in class actions designed to end desegregation or improve educational practices when they will ultimately attend school, as are future prisoners, future housing tenants and future employees in class

actions regarding conditions that will eventually affect them.[36] Similarly, representative actions to protect the future interests of unborn heirs and unborn or future beneficiaries of trusts date back centuries.[37] Future claims are paid and discharged in Article III bankruptcy proceedings, heretofore without running afoul of Article III.[38] None of these plaintiffs would have an immediate claim for relief – indeed, many would not even be alive at the time of suit. Accordingly, all of these practices would be invalid under petitioners' novel and insupportable contention.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be affirmed.

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[36] *See, e.g., Missouri v. Jenkins*, 495 U.S. 33, 37 n.2 (1990); *County of Riverside v. McLaughlin*, 500 U.S. 44, 49 (1991); *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 192-193 (1991).

[37] *See, e.g., McArthur v. Scott*, 113 U.S. 340, 401-02 (1885); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

[38] *See, e.g., In re UNR Industries*, 20 F.3d at 770; 11 U.S.C. § 524(g). Since bankruptcy courts are subject to Article III, *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76 (1982), section 524(g) of the Bankruptcy Code would be unconstitutional under petitioners' view of Article III. *See* CA 176a n. 76. It is indeed ironic that what petitioners elsewhere in their brief insist is the course that should have been followed in this case – bankruptcy – would itself be unavailable on their view of the law.

Respectfully submitted,

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ESTEBAN ORTIZ, ET AL.,
Petitioners

v.

FIBREBOARD CORPORATION, ET AL.,
Respondents

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONERS

The Respondents would have the Court believe that this class action is about insurance policies, not asbestos injuries — that it is about the Insurers' liability to Fibreboard, rather than Fibreboard's liability to asbestos victims. This pretense is woven into Respondents' arguments about class certification under Fed.R.Civ.P. 23(a), adequacy of representation under Rule, 23(a)(4), mandatory class treatment under 23(b)(1)(B), and justiciability. Once this thread is pulled, all of Respondents' efforts to defend the judgment below come unraveled.

1. Rule 23(a) Certification. The Respondents have abandoned the opinion below. They make no effort to justify the Fifth Circuit's reliance on a watered-down standard for certification of settlement class actions. See Pet. Br. 10, 13-14.[1] Nor do they deny that the Fifth Circuit certified this class on the basis of issues arising from the settlement itself. Pet. Br. 10, 14-15. Nor do they seek affirmance of class certification here by reference to the issues raised by the legal claims actually pleaded in the class complaint. Rather, they ask for approval of the certification of this class by reference to the very different legal and factual questions raised by *other* causes of action pleaded by *other* parties in *other* lawsuits filed in *other* courts in *other* jurisdictions. Class Br. 24-26. Surely this will not do.

The named plaintiffs pleaded, on behalf of a vast class of exposure-only plaintiffs, supposed state-law causes of action for "fear" and "risk" of future asbestos diseases — claims that Class Counsel admit do not exist as a matter of law and that they never intended to litigate. JA 128a, 129a, 172a-173a, 204a (see discussion at Pet. Br. 5-6, 45). But the settlement approved below releases future causes of action for wrongful death and other genuine asbestos injuries that class members may one day develop — causes of action that rest on an entirely different factual predicate from the pleaded "fear" claims, largely because the future claims, if they occur, will rest on facts that have not yet transpired, such as an individual class member's actual disease or death.

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[1] Citations to Petitioners' main brief will be styled "Pet. Br." Citations to Class Counsel's Brief and the joint Insurers - Fibreboard Brief will be styled "Class Br." and "Ins. Br." respectively.

Rule 23(a)(3) requires that the "claims" pleaded by the class representatives must be typical of the "claims" of the class itself, *Amchem Products v. Windsor*, 117 S.Ct. 2231, 2249 n.18 (1997), yet Class Counsel have forsworn the asbestos tort claims against Fibreboard that they pleaded in the complaint. They instead rely, for certification of this asbestos tort class action in a federal court in Texas, upon *hypothetical* insurance coverage claims that Class Counsel say the class representatives *could have* pleaded — but did not plead — against the Insurers in the state court coverage case in California — litigation to which no member of the class was even a party. There is not even any factual or legal overlap between the asbestos personal injury claims at issue here and the hypothetical insurance coverage claims upon which Class Counsel urge the Court to base certification. But unless Rule 23(a)'s requirements were satisfied specifically with reference to the individual damages claims released by this class settlement, Class Counsel and the class representatives could not properly negotiate *any* alteration of absent class members' rights with respect to those claims.

Thus, the only way to affirm the judgment below is for this Court to abandon the fundamental tenets of class representation, which mandate (1) that the "claims" that are the guidepost to class cohesion be the actual claims raised in an "'actual'" lawsuit, *Amchem*, 117 S.Ct. at 2249 n.18; (2) that the "claim[s]" presented by the named plaintiffs be closely "interrelated" with the "claims" to be litigated or released on behalf of the class, *General Telephone Co. v. Falcon*, 457 U.S. 147, 157 n.13 (1982); and (3) that the authority of class plaintiffs to bind absent class members be limited to the common and typical claims pleaded in the class complaint (or to claims arising from the identical facts as those pleaded). *National Super Spuds v. New York Mercantile Exchange*, 660 F.2d 9, 17-19 & n. 7 (2d Cir. 1981); *Grimes v. Vitalink Comm. Corp.*, 17 F.3d 1553, 1563-64 (3d Cir.), *cert. denied*, 115 S.Ct. 480 (1994).[2]

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[2] Respondents caricature this as "the contention that class actions can *never* include future claims." Class Br. 26-27. We urge no such categorical rule. Class actions including future members can be certified with respect to claims for declaratory and injunctive relief because, by the very nature of the relief sought, any decree must bind all similarly situated persons to be effective. *See* cases cited in Class Br. 50 nn. 36 & 37. But this case seeks resolution of individual, future, *personal injury* claims which depend upon the individual circumstances of each class member. *See Amchem*, 117 S.Ct. at 2250. And with respect to exposure-only class members, who constitute most of this "futures" class, such circumstances have not yet arisen. Class representatives cannot act on behalf of absentees in this context.

Class Counsel scramble to repackage their class complaint not as pleading personal injury tort causes of action *against Fibreboard*, but as making claims *against the Insurers* to third-party beneficiary status under the liability insurance policies. Class Br. 21, 24, 25-26 nn. 16 & 17. This fantasy is dispelled by simply reading the complaint: Fibreboard is the only party named as a defendant and the only claims pleaded seek damages for asbestos torts. (CA 560a-564a). The class plaintiffs never allege that they have any rights, as third-party beneficiaries or otherwise, under Fibreboard's insurance policies, nor do they seek a declaration of any such rights. The insurance coverage dispute is mentioned only in reference to the California state court lawsuit between Fibreboard and the Insurers, which is where, according to the class complaint itself, the coverage issues had been pleaded and were being litigated. CA 558a, ¶ 20. Indeed, it was the imminent judicial resolution of those coverage claims against the Insurers in the California case (rather than here) that supposedly created the need for quick settlement, in this case, of the asbestos tort claims against Fibreboard. Furthermore, Respondents admit that no issues relating to the insurance policies were litigated at the settlement fairness hearing in this case. Class Br. 45 n.33. In a remarkable understatement, Class Counsel describe their failure to include in the class complaint the claims that they would now rely upon to certify this class under Rule 23(a)(2)&(3) as a failure to "plead[] artfully." Class Br. 18.

The game is up. By relying exclusively on claims in the entirely separate coverage litigation to which the class was not a party, Respondents admit that the class cannot be certified by reference to "the legal or factual questions that qualify each class member's case as a genuine controversy." 117 S.Ct. at 2249. They repeat the irrelevancy that they "could have" pleaded a different case about third-party beneficiary status and "could have" sought certification of a class on that basis. Class Br. 26 n.17, 45 n.33. But the fact remains that they did not. More important, a class certified

on such a basis, even if cohesive, would be *aligned with Fibreboard* against the Insurers with respect to the coverage dispute. Such a class would still lack the cohesion on legal and factual issues *relating to asbestos claims* that would be necessary to litigate or settle the individual class members' *personal injury claims against Fibreboard*.[3]

Authority to represent an absent class is not dispensed in gross. Class cohesion and hence class certification with respect to one claim does not empower the class plaintiffs to bind the class with respect to any and all claims that individual class members might have against the named defendant. Suppose there were a corporation with thousands of shareholder-employees who currently held or in the future might hold against the corporation a wide variety of tort claims for money damages, including claims for personal injuries in the workplace, fraud, invasion of privacy, violations of retirement and benefit plans, and sex, race, age and disability discrimination. Most of the claims are future claims, not yet ripe, without existing injury but alleging a risk of future harm. We don't know yet who has which claims. But there are common problems affecting all the employees' claims — the corporate directors have absconded with most of the company assets that could be used to pay these myriad tort claims, and the insurance company that issued the officers' and directors' liability policy has disputed coverage, so the only other source of recovery is likewise in jeopardy.

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[3] Even Class Counsel's assertion that exposure-only class members "could have" sued the Insurers under California law for a declaratory judgment respecting coverage of their tort claims against Fibreboard is dubious and contradicted by their own authorities. Class Br. 24 & n.15. Although California law does permit *presently injured* tort victims to sue a tortfeasor's insurance carrier as third-party beneficiaries for a declaration of coverage, "the *injured person's* rights against the tortfeasor's insurer arise upon the happening" of the injury. *Shapiro v. Republic Indem. Co. of Am.*, 341 P.2d 289, 291 (Cal. 1959)(emphasis added); *see also Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242 (1937) (to be justiciable, a declaratory judgment action on an insurance policy must involve "an adjudication of a *present right upon established facts*")(emphasis added). Every case Class Counsel cite involved a plaintiff with an existing injury. Here the overwhelming majority of class members have not yet suffered an injury from asbestos exposure and any potential claims they might have against Fibreboard's insurers are therefore not ripe.

Under Respondents' radical reinterpretation of Rule 23, a handful of those employees, pleading only claims that they admit are a pretext and that don't exist under governing law — e.g., claims for fear of future contumacious corporate behavior — would have the power to litigate or settle all the myriad types of money damages claims against the corporation on behalf of the entire class of shareholder-employees, *not* because the class was cohesive with respect to the sham claims pleaded against the corporation or with respect to the actual claims released by any settlement, but instead because (1) the class supposedly shared a common interest in seeing the corporation win a series of lawsuits in another jurisdiction against the directors and against the insurance company, and because (2) the class of shareholder-employees itself could have, but had not, brought a shareholder derivative suit against the directors and the recalcitrant insurance companies. Such a drastically fluid and limitless theory of class representation is wholly alien to Rule 23.

Ultimately, Respondents implicitly concede (as they must) that this class is rife with the same differences among class members that defeated certification in *Amchem*—questions of individual exposure, injury, health history, and state law. Yet they insist that these differences are irrelevant because the Global Settlement does not of its own terms liquidate individual claims for specific sums of money, but instead leaves resolution of those different factual questions to the Trust's ADR process, which will consider such differences "in accord with their demonstrated significance in the tort system." Class Br. 28. This same argument was, of course, made by the settlement proponents in *Amchem*,[4] and it was rejected by this Court. 117 S.Ct. at 2248-50.[5] It profits Respondents nothing to tout the

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[4] See Br. for Petitioners Amchem Products, Inc. *et al.* in *Amchem*, No. 96-270, at 42 ("the disparate legal issues relating to liability, defenses, and damages" that the Third Circuit relied upon in decertifying the class "are irrelevant under the terms of the settlement," which employs an ADR process that "appl[ies] a formula that takes into account the considerations that bear on recovery in the tort system.").

[5] Respondents' reliance on the Trust ADR scheme to render this asbestos class magically uniform is misplaced for another reason: leaving the effect of the vast variations within the class to be determined by the ADR process does not eliminate those differences — it merely delays their resolution. We have no

ADR process in this settlement as supposedly more fair than that in *Amchem* (Class Br. 28 n.18), because class cohesion — not the settlement's fairness — is the issue.[6] The certification inquiry focuses on the legal or factual questions "that preexist any settlement," 117 S.Ct. at 2249, because the class must be cohesive at the front end, *before* the settlement deal is cut. Class Counsel ignore the fundamental lesson of *Amchem*: If the class can be certified only by relying on the settlement to eliminate the differences among class members that would otherwise defeat commonality and typicality, then it follows that the class was not sufficiently cohesive to allow a settlement to be negotiated in its name in the first place.

2. Rule 23(a)(4) Conflicts. Class Counsel's responses confirm not only that the class was beset by disabling conflicts, but that Class Counsel themselves harbor disturbing and dangerous notions of "adequate" representation. For example, although this Court in *Amchem* deemed "significant" and "salient[]" the inherent conflict between "currently injured" and "exposure-only" class members over "allocation decisions designed to confine compensation," 117 S.Ct. at 2251, Class Counsel disparage conflicts over allocation of settlement funds as "trivial" fights over "tangential" or "theoretical" "side issues." Class Br. 33, 35, 32. Currently injured class members seeking adequate representation are brushed off as "special

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idea how Respondents' supposedly omniscient Trust will resolve individual claims for particular asbestos injuries because, unlike *Amchem*, the settlement here does not even specify a general range of awards for injuries. We are baffled as to why Class Counsel think it better to have a settlement that provides class members with *less* information about how much their claims will be worth under the settlement and that provides *fewer standards* to limit the discretion of those who will control the Trust ADR process.

[6] Although the Questions Presented concern class certification under Rules 23(a) & (b), Respondents oddly devote a lot of space to comparing settlements, see Class Br. 18, 20-23, and they begin and end their briefs by arguing that the Global Settlement is "fair under Rule 23(e)." Ins. Br. 50; *see also id.* at 1-2, 21, 22, 30, 41; Class Br. 3, 16, 20-23, 28 n.18. The Court should reject this invitation to make an "appraisal[] of the chancellor's foot kind—[a] class certification[] dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness." *Amchem*, 117 S.Ct. at 2248.

interests." Class Br. 32. And class members afflicted with mesothelioma or other fatal, asbestos-induced cancers, for which multi-million dollar judgments are familiar, and who therefore are severely prejudiced by the settlement's arbitrary limit of $500,000 on compensatory awards, are dismissed as "unknown and unidentifiable" class members with whom Class Counsel cannot be bothered. Class Br. 34. Such attitudes bode ill for adequacy of representation, because the vast majority of this "futures" class consists of just such "unknown and unidentifiable" asbestos victims.

To take the first point, the conflicts between current and future victims over allocation of the settlement fund were not deemed "tangential" or "trivial" in *Amchem*, and the supposedly limited nature of the "fund" here only makes the problem worse. 117 S.Ct. at 2251. Respondents have previously conceded that a conflict is created by the settlement's allocation of funds to preserve money for late-arriving claimants, see citations at Pet. Br. 20, and Class Counsel's brief again confirms that, in a "limited fund" case, there is "a substantial degree of tension within the class" between current and future plaintiffs. Class Br. 35. Similarly, Respondents criticize the Trilateral Settlement because, without the Global Settlement's restrictions limiting recoveries, there's a risk that "late-comers" will be left without compensation. Class Br. 14. That proves the very conflict upon which this Court based decertification in *Amchem*.

Having recognized the existence here of the very conflict this Court deemed fatal to class certification in *Amchem*, Respondents repeat their prior argument that the class's supposed "common interests" in a settlement "outweigh the differences over allocation" of recovery under that settlement. Class Br. 35. Class Counsel repeatedly chant that the Global Settlement is of "overriding common concern" to the class and that this justifies ignoring any conflicts within the class. Class Br. 31, 32, 33. We are re-plowing old ground here: The desirability of the settlement and its overall fairness to the class may be grounds for approving it under Rule 23(e) if one reaches that point, but they do not warrant certification of a divided class under Rule 23(a)(4). Even if we were to assume arguendo that the settlement is a good deal "'that serves the aggregate interests of the entire class, . . . adversity among subgroups'" would still mandate subclasses and separate

representation before a court could certify the class, let alone approve the settlement. *Amchem*, 117 S.Ct. at 2251.

Class Counsel next argue that the "impending appeal in the coverage litigation" created a "sense of urgency" to settle the case before the appeal could be heard, and that the "injection of subclasses" to address the conflicts would have upset the negotiation timetable. Class Br. 31-32. What kind of rule of law is this — if you're in a hurry, adequacy of representation doesn't count? Respondents offer neither precedent nor principle that would justify dispensing with the requirements of Rule 23(a)(4) when the proponents of a settlement hasten to resolve, supposedly at the last minute, a dispute that has been in litigation for years. If anything, the parties' rush to judgment "warrant[s] more, not less caution on the question of certification;" Rule 23's specifications "demand undiluted, even heightened attention in the settlement context." *Amchem*, 117 S.Ct. at 2248 & n. 16.[7]

The hollowness of Class Counsel's appeal to supposed exigency is revealed by their general plea that *Amchem's* rule requiring subclasses be relaxed lest it "invalidate virtually every class action settlement." Class Br. 34. Respondents fear that Rule 23(a)(4) will be read to deem single, class-wide representation inadequate whenever, as is often the case, "different factions of the class . . . have differing interests concerning the allocation of damages" under a settlement. Class Br. 34. They're beginning to get the point: Adversity among subgroups *means* that the class can't be bound by a settlement unless the subgroups receive separate representation. 117 S.Ct. at 2251. That's as it should be — and it certainly doesn't

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[7] The rush to judgment in August 1993 is hard to understand from the circumstances alone. The California coverage litigation that supposedly compelled haste was 14 years old, and negotiations on a global settlement had been underway since 1990. The necessary subclasses could have and should have been established as soon as global negotiations began. The imminent appellate oral argument was not the first milestone in the litigation (the trial court issued rulings against the Insurers from 1985 to 1990), nor would it be the last, since the case was only in the intermediate appellate court. We understand why the settlement suited the agendas and interests of the Insurers, Fibreboard and Class Counsel (including their 45,000 inventory clients). But those interests cannot justify diluting adequacy of representation when the absent class members — the only ones not at the negotiating table — needed it the most.

doom settlements. It merely requires subclassing and separate representation before classes are certified and settlements negotiated.

Class Counsel also predict that requiring subclasses for adverse groups will doom most 23(b)(1)(B) class actions because "the very predicate" of such limited fund actions — "that the winners of a race to judgment would inequitably prejudice the interest of others — would simultaneously be grounds for a disabling intraclass conflict." Class Br. 36. They are correct that, as this Court noted in *Amchem*, the antagonism among subgroups over allocation of a settlement is sharper in a limited fund context. 117 S.Ct. at 2251. But this fact, and vigorous application of Rule 23(a)(4), do not imperil unitary resolutions under Rule 23(b)(1)(B) in appropriate circumstances — *so long as groups with competing interests are subclassed and separately represented.* This is hardly a radical or unworkable requirement. In bankruptcy proceedings to divvy up the assets of an insolvent debtor, for example, different types of creditors are segregated into subgroups, with separate representation on the creditor committees, and approval of a bankruptcy plan requires the consent of the several committees.

Respondents' final plea is that the disabling conflicts here "cannot be a reason to throw out the entire Settlement." Class Br. 37. But, at the risk of repetition, the issue before the Court is *not* the approval of the Settlement but the class *certification.* If the class is riven by conflicts, it must be decertified. The parties are then free to try to start over. Moreover, even the "central decision of whether to settle for the proffered amount," Class Br. 33, was infected here by disabling conflicts between those inside and outside the class. The class was gerrymandered to exclude Class Counsel's own clients so that they could get a better deal.[8] Class Counsel's representation of the class was impaired by their duty to their 45,000 prior inventory

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[8] We are told that the exclusion from the class of Class Counsel's own clients who separately settled with Fibreboard is not gerrymandering, but "simply a function of the *parties' definition* of what were settled cases." Class Br. 41 n.30 (emphasis added). That's precisely our point: The class definition that excluded their own inventory of clients was not a fact of nature, but a definition manipulated by Class Counsel to the advantage of their own clients. Petitioners objected below to this separate treatment for Class Counsel's own clients (CA 117a-118a, 142a-145a) and also raised the issue in the petition for certiorari as one of several disabling conflicts. Cert.Pet. 8, 14 n.7.

clients who were competing for the same dollars[9] and whose recovery under their own separate settlements was contingent on a Global Settlement for the class.[10] And Class Counsel don't even try to dispute that they sold class members' opt-out rights when the Insurers agreed to pay more for a mandatory class action. See Pet. Br.26-27.[11]

3. Rule 23(b)(1)(B). Respondents have expressly abandoned their prior arguments for certifying this class under (b)(1)(B) as a limited fund class action, even though they concede that was the basis for the judgment below. Ins. Br. 29. They make no effort to dispute the facts that: (1) No matter how Fibreboard and its various

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[9] Class Counsel do not even try to distinguish the authorities holding that class counsel may not concurrently represent clients suing outside the class. See Pet. Br. 22 & n.18.

[10] Class Counsel assert that they owed no further duty to their inventory clients once the inventory settlements were made, even though half of the money due under those settlements was contingent upon achieving a Global Settlement for other parties (the class here). Class Br. 39 n.28. They could not be more wrong. First of all, those claimants in all likelihood continued to be clients of Class Counsel, both in the sense that they expected to receive contingent settlement payments through their lawyers and in the sense that those lawyers continued to represent the claimants with respect to claims against other asbestos defendants. Secondly, even if the representation really did terminate for some clients upon reaching those contingent settlements, ABA Model Rule of Professional Conduct 1.9(a) prohibits future representations that are materially adverse to a former client unless the former client consents, and here the duty to the class to get a great settlement or not to settle at all was adverse to the interest of the inventory clients in getting the second half of their own settlements, which Class Counsel could ensure only by agreeing to a settlement — any settlement — with Fibreboard and the Insurers.

[11] Finally, Class Counsel insist that the conflict between pre-1959 and post-1959 asbestos victims was eliminated, not by the terms of the Settlement itself, but by other understandings between the Insurers and Fibreboard. Class Br. 37-38. But they do not deny that discriminatory treatment of these groups persisted thereafter even in Class Counsel's own inventory side-deals. See Pet. Br. 21 n.17. Moreover, many months after this disparity is supposed to have been eliminated, Class Counsel pleaded in the class complaint (September 1993) that, despite prior agreements, the post-1959 victims were not covered by Fibreboard's insurance policies. CA 559a, ¶23. This belies Class Counsel's post hoc attempts to paper over this disabling class conflict.

assets are considered, there simply is not a limited fund here (see Pet. Br. 23-25, 28-31); and (2) The settlement fund was contrived by the Respondents in order to suit the corporate goals of the Insurers and Fibreboard, and certification as a mandatory (b)(1)(B) class was bought and paid for by the Insurers in order to strip class members of the opt-out rights that would have inconvenienced the Insurers' actuarial forecasts of future liability. Pet. Br. 25-28. Therefore, the judgment below must be reversed unless the Respondents can persuade this Court to accept new grounds for mandatory class certification.

Respondents profess bewilderment as to the source of the notion that, in class actions for damages where the fear is that the defendant will run out of assets, (b)(1)(B) requires a limited fund. Ins. Br. 27. But "limited fund" analysis of mandatory classes is well settled. See Pet. Br. 28. The Insurers themselves were the first to propose certification expressly as a limited fund class; indeed, that was the *sole* basis on which they sought (b)(1)(B) certification in their original pleading.[12] That was likewise the sole basis on which (b)(1)(B) certification was sought in the class complaint. CA 558a ¶18. Accordingly, the Fifth Circuit expressly and repeatedly held that certification of this class turned on the existence of a "limited fund." CA 73a, 74a, 75a, 77a. In the courts below, Respondents couldn't settle on a single theory for mandatory class treatment, see Pet. Br. 23-24 & n.21, and apparently they are still shopping for something that will sell.

The Respondents invoke other types of mandatory classes mentioned as examples in the Advisory Committee Notes to Rule 23. Ins. Br. 28. But we have already distinguished those: Unlike this case, they involved either injunctive relief, which by its nature necessarily operates upon the entire class affected by a defendant's conduct and therefore requires a mandatory class-wide resolution,[13] or the division of property already held in common by the members

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[12] See JA 527a-529a (letter to the court); Intervenors' [Continental & Pacific] Answer and Counterclaims Pursuant to Rule 24 (Sept. 9, 1993) at ¶15.

[13] See Pet. Br. 23 n. 20, 31 n. 26.

of a pre-existing, voluntary association of some sort.[14] Those cases provide no precedent for certifying a mandatory, nationwide class of widely varying, future, individual, *in personam* claims for damages for asbestos personal injuries.

Unable to find precedent for this class action in the Advisory Committee Notes or elsewhere in the history of Rule (b)(1)(B), Respondents nevertheless insist that the circumstances of this case fit within the language of the Rule. They are mistaken. Rule 23(b)(1)(B) permits a mandatory class if:

> the prosecution of separate actions by . . . individual members of the class would create a risk of adjudications with respect to individual members . . . which would as a practical matter be dispositive of the interests of other members . . . or substantially impair or impede their ability to protect their interests.

We are told that "failure by the class to file and maintain a class action to resolve the coverage disputes on a unitary basis . . . would have put class members to the 'significant risk' that Fibreboard would lose its claimed insurance as a result of the coverage disputes." Ins. Br. 25. This makes no sense.

First, even if the supposed need to file "a class action to resolve the *coverage disputes* on a unitary basis" could justify certification of some other hypothetical class action, it could never justify certification of *this* class action because, as demonstrated above, page 3, *this* class action pleads and seeks resolution only of the class's individual *tort claims against Fibreboard*, *not* of Fibreboard's claims under its policies with the Insurers.

Second, the "prosecution of separate actions" by individual class members did not "create" the "risk" identified by Respondents as justifying this non-opt-out class. The risk they point to is the risk that Fibreboard might end up with no insurance to pay claimants. But a 14-year-old insurance lawsuit in California between

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[14] See Pet. Br. 29 n.23. The only new case cited by the Respondents, *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921), Ins. Br. 28, falls into this same category. It was a suit seeking reorganization of a fraternal association, where any decision would necessarily bind all the members of that pre-existing, voluntary association, which already held in common the property (mortuary and other benefit funds) under dispute.

Fibreboard and its Insurers created that risk, which existed whether class members prosecuted their tort claims separately or together.[15]

Respondents next argue, for the first time in the long history of this case, that any separate tort suit against Fibreboard "could have itself resulted in an adjudication that the insurers owed no coverage" if the individual plaintiff "sought to have Fibreboard's liability paid by the insurers," because they would have "defended on the ground that they owed no coverage to Fibreboard." Ins. Br. 25. Such an individual "adjudication in favor of the insurers," Respondents contend, would "conclud[e]" the matter with respect to other asbestos plaintiffs. Ins. Br. 25-26. But of course they are wrong. No other plaintiff who was not a party to that individual adjudication would be bound by it.[16] Therefore, the plain language of Rule 23(b)(1)(B) could not be met here, because there was simply no risk that a loss on the coverage issue in a suit by one class member would "be dispositive of the interests of other members of the class."[17]

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[15] The only thing that would eliminate the risk of coverage loss would be a settlement of that California lawsuit. The proposition that the Insurers would not settle that suit unless all future claimants were simultaneously locked into a settlement of their tort claims against Fibreboard — assuming arguendo that was so — was likewise not a risk created by individual lawsuits (as required by Rule 23(b)(1)(B)), but was simply a function of the Insurers' negotiating posture, dictated by *their* economic interests, *not* those of the class. In any event, given the obvious incentives driving both sides to settle, it is fantastic to suggest that the Insurers couldn't settle the coverage dispute without also settling all future tort claims against Fibreboard. After all, the Trilateral Settlement, by its own terms, *does* settle the insurance dispute independently without resolving the class members' tort claims.

[16] "It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979); *see also Blonder-Tongue Laboratories v. University of Illinois*, 402 U.S. 313, 329 (1971).

[17] Moreover, even if it were true that prosecution of any separate tort suit would have had such dire consequences for the class, that "risk" could not sustain certification of this gerrymandered class, because Respondents admit that they excluded "'present' asbestos claimants" from the class (Ins. Br. 30 n.*), and separate adjudication of those claims would create the identical risk supposedly feared by Respondents.

However, if the class member *won* on the coverage issue, the *Insurers* might well be bound on that issue with respect to the entire class, since the Insurers *would* have had a full opportunity to litigate.[18] "This means that each case is essentially a test case for the defendant but not for the claimants who are not parties. The result is a great disparity in litigating risks." Fleming James & Geoffrey Hazard, CIVIL PROCEDURE §11.24 at 634 (3rd ed. 1985). Thus, separate adjudications posed no risk to the class *but did pose an enormous risk to the Insurers*. The "unitary resolution" so desperately sought by the Insurers was "necessary" not to protect the class, Ins. Br. 35, but to protect *themselves*. See Pet. Br. 26-27.

Plainly, that is not a basis for shanghaiing hundreds of thousands of future tort victims into a mandatory class action in order to strip them of their rights under state law. Both Class Counsel and the courts below (CA 82a) previously admitted that the whole point of the mandatory class here was to abridge and "limit[] class members' rights to obtain immediate and full payment of their individual state-law claims." Class BIO 20; see Pet. Br. 33. Yet Respondents now profess never to have heard of the common law rule of "first in time, first in right," under which tort judgment creditors may collect in full, regardless of the interests of other future tort claimants against the same defendant. Ins. Br. 40 n.*; Class Br. 36 n. 25. It is established law that "if a plaintiff recovers judgment and obtains execution against defendant's property, another person having a claim against defendant may not contest the property transfer effectuated by the execution" — "except, for example, when a bankruptcy proceeding may be used to set aside such a transfer." James & Hazard, CIVIL PROCEDURE §11.23 at 631.[19] Abridging the state-law rights of tort judgment creditors by use of a Rule 23 (b)(1)(B) class violates the Rules Enabling Act.

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[18] *See Parklane*, 439 U.S. at 328, 331; *Blonder-Tongue*, 402 U.S. at 328-29; RESTATEMENT (SECOND) OF JUDGMENTS §29.

[19] *See also* CORPUS JURIS SECUNDUM, INSURANCE §1697 Multiple Claims; Priorities and Settlements (1993)("Where there is no statutory provision which is applicable and there is no pro rata provision in the [insurance] policy, the contest of multiple plaintiffs for the limited assets of a common uninsured defendant is generally solved in terms of chronological priority, that is, first in time, first in right."). See cases discussed at Pet. Br. 32 & nn. 28-29.

Respondents contend that we face a "heavy burden" to show "that an intended application" of a federal rule would be invalid under the Rules Enabling Act. Ins. Br. 34. Their argument begs the question because the employment of Rule 23(b)(1)(B) in the circumstances of this case is *not* an "intended application" of that Rule at all. First, (b)(1)(B) was never intended to be a means of collectivizing individual mass tort claims on the supposition of the defendant's future insolvency. See Pet. Br. 28-31 & n. 27. Second, Respondents have offered nothing to show that the drafters of the rule intended to create a revolutionary — and profoundly *in*equitable — form of pseudo-receivership in which the debtor's assets are left untouched while those creditors whom the debtor has injured most grievously are forced to bear the entire brunt of a *pro rata* cram-down. See Pet. Br. 34-36.

Respondents do not dispute either of these points directly. Instead they offer a medley of out-of-context snippets culled from inapposite equity cases dating back to the 17th century. Ins. Br. 34-41. Many of these cases are the same ones they cited in their briefs in opposition, which we have already distinguished. See Pet. Br. 28-29 n.23.[20] Much of the "authority" is so generic as to be meaningless — as in the frequent quotations supposedly suggesting that collective treatment of claims is appropriate whenever it would help "'to

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[20] Respondents' own principal authorities establish that both common law and equity historically refused to permit one party to bind absentees with respect to individual damages claims unless all such claims were asserted against a common fund. Using one of Respondents' key cases, *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921), as an illustration, Prof. Chaffee (upon whom Respondents also rely) explained the "cardinal principle of such class suits": absentees may be bound only if "connected similarly with land or money within the jurisdiction . . .[But] if the unjoined persons have special claims or liabilities, their rights are personal and can not be concluded in their absence." Zechariah Chafee, SOME PROBLEMS OF EQUITY 164-65 (1950). All of the early cases upon which Respondents rely confirm this "cardinal principle."

Unlike Prof. Chaffee, Respondents fail to distinguish the joinder device of the "bill of peace" — which is analogous to a consolidation under Fed.R.Civ.P. 42 — from the radically different class action device. See Ins. Br. 37 n.** (citing Chaffee but failing to reveal that his analysis referred to bills of peace and *not* to class actions). The critical distinction is that a bill of peace had no *res judicata* effect on parties who did not actually appear personally in the proceeding.

prevent a failure of justice.'" Ins. Br. 36, 37 & n.**.[21] All of this leads up to Respondents' breathtaking assertion that the certification of a non-opt-out class consisting of hundreds of thousands of unidentifiable, future mass tort victims with individual personal injury claims is authorized by "almost 150 years of unbroken prior precedents" (Ins. Br. 41) — or, better yet, that it is "established by centuries of jurisprudence." Ins. Br. 35. This is preposterous. Even the district court below admitted that the certification of this case under 23(b)(1)(B) was an untried "novelty" that the court was determined to pioneer. CA 186a. In more candid moments in that court, the Respondents likewise described this class action as "unprecedented." JA 579a.

It is unprecedented largely because the problems of asbestos defendants threatened with a future stream of tort liabilities have previously been handled through bankruptcy.[22] The Respondents do

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[21] Although Respondents concede that equity allowed mandatory disposition of the rights of absent parties *only* when the parties held property in common and shared a "pre-existing jural relationship," they insist that those circumstances exist here. Ins. Br. 38. We are told that hundreds of thousands of unknowing, unidentified future asbestos claimants, who may one day have individual personal injury claims against Fibreboard, have the same pre-existing jural relationship with one another as do the voluntary members of a religious society who owned, in common, certain pre-existing property generated by the voluntary contributions of the society's members. *See Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 298, 303 (1853). Ins. Br. 38. Merely to state such propositions is to explode them.

Respondents insist that the class is bound together by "[t]his action" itself, "in which they seek to resolve their rights of ownership of the proceeds of [Fibreboard's] policies." Ins. Br. 38. (1) This is circular reasoning: if all that were required to unify a class were the inclusion of its members in a proposed class action, there would be no limit to the rule's application. (2) This action does not, in fact, plead any claim against the Insurers or any claim to rights of any kind under the policies; it alleges only tort claims against Fibreboard. (3) The uninjured class members who constitute most of the class have no pre-existing "rights of ownership" to the policy proceeds; indeed, they do not even have a ripe claim to a declaration of their potential future rights under the policies.

[22] Indeed, Class Counsel went on record early in this case as adamantly opposed to the abuse of (b)(1)(B) to circumvent the requirements of the Bankruptcy Code. JA 559a-560a. Class Counsel's opposition stopped only

not deny that there are special provisions in the Bankruptcy Code tailor-made for asbestos defendants and future plaintiffs. See Pet. Br. 38.[23] They do not deny that bankruptcy law is far more protective of the interests of absent, future tort claimants than is Rule 23(b)(1)(B). See Pet. Br. 37 & n.35. Nor do they deny that the courts below self-consciously employed Rule 23 to circumvent the bankruptcy laws because the courts deemed themselves empowered to judge Congress's handiwork inadequate.[24]

Respondents' defense of the Fifth Circuit's evasion of the bankruptcy laws rests, in their own words, on "one central fact: class members could not have put Fibreboard into bankruptcy in August 1993, when the Global Settlement was reached." Ins. Br. 31. But that "fact" is dubious and the choice of date is entirely self-serving. What makes August 1993 the magic moment? The

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when, according to their own sworn deposition (JA 114a) — which they have never disputed — the Insurers took out their "checkbook." See Pet. Br. 27.

[23] Respondents suggest that this special bankruptcy relief was unavailable to them because 11 U.S.C. §§524(g) & (h) were enacted after the Global Settlement was reached. Ins. Br. 33. That is misleading. By the time those asbestos provisions were enacted in 1994, the device they set forth, originally crafted by bankruptcy judges, had been in use for a decade in asbestos bankruptcies. The 1994 amendments were adopted expressly to codify that device. *See* 1 REP.NAT'L BANKR.REV.COMM'N 319-320 (1997); H.R.Rep. No. 835, 103d Cong., 2d Sess., 40-41 (1994). Fibreboard was well aware of that mechanism: While it was arranging this class action to circumvent bankruptcy in August of 1993, Fibreboard, as a member of an organization called the Committee for Equitable Compensation, vigorously opposed enactment of the 1994 asbestos amendments. *See The Need for Supplemental Permanent Injunctions in Bankruptcy: Hearing Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 103d Cong., 1st Sess. 30, 41 (1993).

[24] Respondents' reliance on 11 U.S.C. §305(a)(1) is wholly misplaced. That section allows abstention in favor of voluntary, out-of-court, private reorganization and debt resolutions (Pet. Br. 37-38), whereas this case involves the use of a federal court to foist a mandatory class action upon hundreds of thousands of unknowing, unidentifiable, unconsenting absent class members. Every §305 case cited by Respondents involved not a mandatory mass tort class action, but a voluntary private agreement wherein all the creditors were identified, all had an opportunity to participate personally, the agreement was approved by all participating creditors, and all the debtor's assets were at issue. See Ins. Br. 32 n.**.

negotiations for this settlement began in *1990* (CA 291a-293a) and, although it is a fact Respondents would prefer to duck, the California court conducting the insurance coverage litigation expressly found that, during this period, plaintiffs indeed had the power to "place Fibreboard in involuntary bankruptcy rather than accept deferred settlements." JA 486a, 489a. Respondents themselves confirmed this fact in the formal class notice documents. JA 878a-879a. So involuntary bankruptcy was an option after all.

Furthermore, bankruptcy was an option that Fibreboard itself could always initiate, just as it initiated this global settlement alternative when it approached Class Counsel in 1990. CA 293a. The fact that bankruptcy threatened Fibreboard's avowed goal of resolving all future asbestos claims without touching any of its shareholders' equity certainly *explains* why Fibreboard recoiled from bankruptcy in favor of the mandatory class action that it managed to coax out of the district court below. But it hardly *excuses* that circumvention of the law.

The Respondents contend that this case opens no door to widespread evasion of the bankruptcy laws because the supposedly unique circumstances that justify this class action will never be replicated. But affirmance of the decision below would not be some sort of restricted railway ticket, good for this day and train only. As the Second Circuit warned in *Keene Corp. v. Fiorelli*, 14 F.3d 726, 732 (2d Cir. 1993), adoption of such a perversion of Rule 23(b)(1)(B) "would surely lead to further evasion of the Bankruptcy Code as other debtors sought relief in mandatory class actions."[25]

4. Due Process Right to Opt Out. Respondents contend that the opt-out right for claims for money damages guaranteed by *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), is inapplicable here because "the gravamen of this action is for quintessentially 'equitable relief.'" Ins. Br. 44 n.*. That assertion is contradicted by the complaint itself. See Pet. Br. 31-32, 40. They also contend that *Shutts* does not apply when the class needs a

[25] "We are dubious that a limit to unknown plaintiffs is feasible," and such relief would be applicable to "trade creditors" of a company "deemed to be a limited fund because of insolvency." *Keene*, 14 F.3d at 732. "Certainly the theory pressed here would apply to many products liability cases." *Id.*

unitary resolution of the claims alleged. Ins. Br. 42-43. But, as shown above, the separate prosecution of the class members' tort claims presented no risks to the class, although it would have dashed the Insurers' corporate goal of "total peace." That is why the Insurers, by their own admission, chose "to pay more money" to morph this action from a (b)(3) opt-out class into a (b)(1)(B) mandatory class. See Pet. Br. 26-28. Surely due process protection for absent class members is *more* important, not less, when the defendants admit that they "paid for" the class's opt-out rights.

Finally, Respondents argue that *Shutts'* principles of personal jurisdiction do not apply here because this is a federal court, and "the Constitution permits federal courts to assert personal jurisdiction nationwide." Ins. Br. 43 n.*. But this is not a federal question case, and no federal statute authorizes nationwide jurisdiction here. This is a diversity case in which the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), mandates the application of state-law rules of personal jurisdiction. Respondents do not even try to rebut this proposition, which mandates the decertification of this class with respect to all class members lacking contacts with Texas — that is, the vast majority of the class.

5. Notice. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950), involved the adjudication of "small interests" belonging to absent class members, most of whom could be identified and served notice. The class members had no "individual interest" in "stand[ing] alone" in litigation, but only "shared" interests in a commonly held trust fund. *Id.* This Court held that, "under such circumstances," the risk "that notice might not actually reach every beneficiary" was "justifiable": Although "[n]ow and then an extraordinary case may turn up," in more routine instances the law "has to take some chances" that a few absent individuals won't receive notice. *Id.* This is that extraordinary case, and the question presented is whether it is necessary — and just — to "take chances" with the individual personal injury and wrongful death claims of hundreds of thousands of unidentifiable absent class members, when the only reason the class has been herded into a premature, mass resolution of future claims is that doing so serves the *defendants'* interests. We think not.

6. Justiciability. Class Counsel admit that the claims in the complaint are a sham and were not pleaded in good faith. See page 1 supra. They concede that the complaint pleaded individual damages claims "not to recover individual damages," but to set up a Trust ADR process to pay future claims. Class Br. 48. They concede that the exposure-only class members have suffered no injury in fact sufficient to confer standing to bring tort claims, but insist instead that the requisite "injury" was the "continuation of the coverage disputes." Class Br. 18-19. They assure us that this class "insurance injury" is not "hypothetical," because it was "actually being litigated" — *by other parties in another jurisdiction* — "at the tim of the filing of this action." Class Br. 43. Class Counsel do not explain how that could possibly bootstrap standing for the plaintiff class in *this* case. They assert that the "class members had a cause of action under applicable California law to sue to protect their interests under Fibreboard's insurance policies," Class Br. 48 n.35, but no such cause of action was pleaded here, nor was such declaratory relief sought. See supra page 3. And no such cause of action exists under California law for *uninjured* future tort victims. See supra page 4 n.3.

To Respondents, justiciability requirements are evidently just a charade. Proceeding in that spirit, the courts below invaded the prerogatives of both Congress and the state legislatures by enacting the Respondents' negotiated tort reform proposal.

CONCLUSION

The judgment below should be reversed and the case remanded with instructions to decertify the class and to dismiss the action for lack of a justiciable controversy.

Respectfully submitted,

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No. 97-1704

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ESTEBAN ORTIZ, *et al.*,

Petitioners,

v.

FIBREBOARD CORP., *et al.*,

Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C., IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm that specializes in precedent-setting and socially significant litigation. It is dedicated to pursuing justice for the victims of corporate and governmental abuses. Litigating throughout the federal and state courts, TLPJ prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless.

As part of its efforts to ensure the proper working of the civil justice system, TLPJ has established a Class Action Abuse Prevention Project to monitor, expose, and prevent abuses of the class action device nationwide. Through this work, TLPJ has become especially concerned about increasing efforts by corporate defendants to create mandatory, no-opt-out settlements that would deprive mass tort victims -- including unknown *future* mass tort victims -- of their constitutional rights to pursue individual damages litigation. TLPJ submits this brief to urge the Court to reject this tactic and make clear that Rule 23(b)(1)(B) cannot be used to force a company's present and future mass tort personal injury victims to forfeit their rights to pursue individual damages claims, while leaving all of the company's other present and future victims' and creditors' rights wholly unfettered.

STATEMENT

The facts of this case are extremely complex and exhaustively set forth in the submissions of the parties. For the purposes of this

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[1]Letters of consent to the filing of this brief have been filed with the Clerk. No counsel for any party authored the brief in whole or in part, and no person or entity other than *amicus curiae* made any monetary contribution to its preparation or submission.

brief, however, only a few key facts are needed to illustrate why the settlement class in this case should not have been certified:

* The class action settlement at issue in this case arose from the financial problems of the Fibreboard Corporation. Fibreboard faced asbestos claims well in excess of its assets and, at the time the settlement was reached, was engaged in a lengthy coverage dispute with its insurers.

* In an effort to resolve all of its problems at once, Fibreboard entered into a proposed no-opt-out global settlement that, if approved, would allow its insurers to establish a $1.525 billion settlement fund, leave Fibreboard's assets intact, and force the class members (all present and future asbestos personal injury victims filing claims after August 27, 1993) to seek compensation through a private, claims processing system. Under the system, class members would receive offers to settle their claims, based in large part on the severity of their injuries. If the class members did not agree to accept the amount offered, they could go through mediation and, after that, arbitration. If they were still unsatisfied, they could then file a tort suit, subject to an overall limitation of $500,000 in compensatory damages. Punitive damages, prejudgment interest, and post-judgment interest would not be recoverable. The class members would not be permitted to seek compensation from Fibreboard, which, according to the evidence introduced below, would walk away with a net worth of approximately $235 million. *See* Appendix to Petition for Writ of Certiorari ("App.") at 13a.[2]

* The class does not include all persons with present or future claims against Fibreboard. By its terms, the class does not include any asbestos personal injury claimants who filed their claims prior to August 27, 1993, any asbestos property damage claimants, and any other tort claimants or creditors with claims against either

[2]Since the settlement, Fibreboard has been sold for $515 million. *See* App. at 13a.

Fibreboard or its insurance policies. These claimants and creditors -- and all other present and future claimants and creditors -- would be free to proceed against Fibreboard in the tort system, with no external limitations on the amount they may seek to recover.

The class in this case does, however, include the unaccrued future personal injury claims of hundreds of thousands of individuals who may not even know that they were even exposed to asbestos, much less that their future claims are being resolved in this class action. The class also includes thousands of individuals whose membership in the class is currently unknown and unknowable (either because no one currently knows of their exposure to Fibreboard's asbestos or because they will not become class members until some time in the future, when they marry a person previously exposed to Fibreboard's asbestos). In addition, the class includes thousands of individuals who do not yet exist -- future spouses and children of class members. All of these individuals' rights are affected by this class action settlement.

SUMMARY OF ARGUMENT

In an ordinary class action suit "wholly or predominantly for money damages," class members must be afforded a full and unfettered right to exclude themselves from the class. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 n.3 (1985); Fed. R. Civ. P. 23(b)(3) and (c)(2). Similarly, in an ordinary class action suit for damages, the unaccrued claims of "future victims" may not properly be pursued, much less settled.

This, however, is no ordinary class action. It began with the appointment of class counsel by a trial judge who urged the lawyers to negotiate a global settlement of cases that had not yet been filed and on behalf of clients who had not yet retained them. *See* App. at 45a. It seeks to settle on a class wide basis claims that the parties never intended to litigate -- and that, in truth, no parties ever *could* litigate. It selects a subset of individuals with present

and future claims -- asbestos personal injury victims who had not filed claims by August 27, 1993 -- and attempts to bar them (and them alone) on a no-opt-out basis from pursuing their claims against the defendant. And it seeks to limit the *future* unaccrued claims of literally hundreds of thousands of individuals who have been exposed to asbestos -- and may not even know it -- as well as those class members' future spouses and children.

The settling parties recognize that this case is extraordinary in all of these respects. Nevertheless, they claim that, under the unusual circumstances of this case, a no-opt-out settlement class that includes present and future mass tort personal injury victims can properly be certified under Rule 23(b)(1)(B) because there is a risk that, absent a mandatory class settlement, individual adjudications will result in an unfair preference for early claimants at the expense of later claimants.

This justification, however, does not withstand scrutiny. Rule 23(b)(1)(B) is designed to protect class members from the risk that their ability to obtain relief from a defendant will be "substantially impaired" by separate prosecution of class members' claims. The rationale for depriving class members of their right to opt out when Rule 23(b)(1)(B)'s criteria are met is that the class members' ability to obtain relief from the defendant will be affected *whether or not* the class is certified. If that is so, then certifying the class is the only way to protect the class members' interests and ensure that all who are subject to the risk of "substantial impairment" have a fair opportunity to obtain relief from the defendant.

When Rule 23(b)(1)(B) is properly applied, it achieves this goal by ensuring that two conditions are met: (1) that all those with claims in risk of "substantial impairment" are included in the proceeding and (2) that the subject of the competing claims is available for just distribution in the proceeding. In this case, however, neither of those conditions have been met.

First, this class action does *not* include all persons who share the risk that individual prosecution of separate actions will "substantially impair" their ability to recover from the defendant. To the contrary, the certified class is woefully underinclusive: it includes some present and all future asbestos personal injury claimants, but does not include other present asbestos personal injury claimants, non-asbestos present or future personal injury claimants, property damage claimants, contract claimants, or any other present or future creditors. As a result, separate actions will continue to be prosecuted against Fibreboard by those who share the same risk of "substantial impairment" in regard to it as the class members do. In this sense, the settlement class certification actually works to the *detriment* of class members -- because they are precluded from asserting their claims against Fibreboard, while similarly situated claimants outside of the class are free to sue Fibreboard without limitation.

Second, the subject of the competing claims is *not* available for just distribution in this proceeding. Indeed, the entire purpose of this proceeding is to make the subject of these claims -- Fibreboard's assets -- utterly *unavailable* to the class members. Under the settlement, the class members are receiving virtually no recovery *from Fibreboard* in exchange for the release of their claims. Thus, instead of protecting class members from the risk that their ability to obtain relief from Fibreboard will be "substantially impaired," certification of the proposed settlement class here ensures that the class members' ability to obtain relief from Fibreboard will be almost totally *eliminated*. *See* App. at 107a (J. Smith dissenting). Rule 23(b)(1)(B) has been turned on its head.

Even if these defects in the Rule 23(b)(1)(B) certification could somehow be overlooked and a no-opt-out class could be permitted, the inclusion of future personal injury victims' claims in the class renders the settlement unconstitutional. The proposed settlement violates the rights of future victims in two distinct ways.

First, the settlement cannot be reconciled with the class members' constitutionally mandated right to receive meaningful notice and an opportunity to be heard. It is well settled that due process requires that class members be afforded an opportunity to present their objections to a settlement that releases their claims. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Plainly, this constitutionally-mandated requirement, protected by Rule 23(e), cannot be met by the class settlement in this case, which attempts to release the claims of hundreds of thousands of future victims who have no way of knowing that they are included in the class. Indeed, this Court recognized the "highly problematic" impediments to adequate notice in class actions involving future asbestos victims just last term. *See Amchem v. Windsor*, 117 S. Ct. 2231, 2252 (1997).

Second, the proposed settlement violates the future victims' constitutional right to adequacy of representation, which is protected by Rule 23(a)(4). As this Court's recent decision in *Amchem* makes clear, Rule 23(a)(4)'s adequacy of representation requirement could never be met in a case of this sort. Like *Amchem*, the proposed settlement class in this case encompasses a huge number of present and future personal injury victims who have fatally conflicting interests in the distribution of the settlement proceeds. *See Amchem*, 117 S. Ct. at 2250-51. Equally important, the class representatives in this case lacked authority to release the future personal injury claims of exposure-only class members. It is axiomatic that class representatives' authority is limited to the claims they possess in common with other members of the class. This principle is clearly violated in a case where -- as here -- the settlement seeks to extinguish future personal injury claims that, by their very nature, do not exist.

Thus, the settlement class in this case must be overturned. It was not properly certified under Rule 23(b)(1)(B) and the inclusion of future personal injury claims in the class renders it unconstitutional.

ARGUMENT

I. RULE 23(b)(1)(B) DOES NOT ALLOW A DEFENDANT TO PREVENT SOME OF ITS PRESENT AND FUTURE MASS TORT VICTIMS FROM PURSUING CLAIMS AGAINST IT, WHILE LEAVING THE RIGHTS OF ALL OTHER PRESENT AND FUTURE CLAIMANTS AGAINST IT UNFETTERED.

In an ordinary class action for money damages, due process requires that class members be permitted an opportunity to opt out. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. at 811 n.3. In this case, however, the parties contend that the settlement class can be certified on a no-opt-out basis because it meets the requirements of Federal Rule of Civil Procedure 23(b)(1)(B).

Rule 23(b)(1)(B) authorizes certification of a no-opt-out class only when

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of ...
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interest of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

The purpose of this provision is to allow for a unitary adjudication in those limited circumstances where class members would be unfairly harmed if some class members attempted to pursue separate litigation against the defendant. *See* Herbert B. Newberg & Alba Conte, 1 *Newberg On Class Actions* ("*Newberg*") § 1.20 at 1-48 (3d ed. 1992). Thus, assuming that the other requirements of Rule 23 and the Constitution are satisfied, Rule 23(b)(1)(B) certification is appropriate when "claims are made by numerous persons against a fund insufficient

to satisfy all claims." Advisory Committee Notes to the 1966 Revision of Rule 23 ("Advisory Committee Notes"), 39 F.R.D. 69, 101 (1966). The reason is that class members' claims will be impaired *whether or not* the class is certified. Certification of an appropriate no-opt-out class action (with appropriate subclasses) protects all of the class members' competing claims equally. It ensures (1) that all those with claims subject to the risk of "substantial impairment" are included in the proceeding and (2) that the subject of the competing claims -- the insufficient fund -- is available for just distribution.[3]

For a class action certification under Rule 23(b)(1)(B) to be proper, therefore, two factual predicates must be met. First, the class action must include all persons whose separate actions create the risk of "substantial impairment" to the interests of the class members. Otherwise, certification fails to protect the class members from the risk Rule 23(b)(1)(B) was designed to address. It leaves those outside the class free to pursue individual litigation for theoretically unlimited amounts of money against the defendant, while permitting class members to recover only from an admittedly "insufficient fund."

Second, the subject of the competing claims must be available for just distribution among the class members. Otherwise, certification makes no sense; the class members are better off risking the outcome of separate prosecutions. In this case, however, neither of these factual predicates has been met.

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[3]An "insufficient fund" is often referred to as a "limited fund." Referring to an "insufficient fund" as a "limited fund," however, confuses the issue. Rule 23(b)(1)(B) focuses on whether the fund is "insufficient" -- i.e., too small to satisfy all claims -- not on whether the fund is "limited." All funds are, to some extent, limited. The Advisory Committee Notes do not speak of "limited funds"; the Notes say Rule 23(b) (1)(B) certification is appropriate when there are "fund[s]insufficient to satisfy all claims." 39 F.R.D. at 101.

A. Rule 23(b)(1)(B) Cannot Be Used to Certify a Class That Includes Only Some of the Individuals Whose Separate Prosecutions Create the Risk of "Substantial Impairment" to the Class.

For a Rule 23(b)(1)(B) class to achieve its purpose, the class must include all individuals and entities whose prosecution of separate claims are likely to impair the class members' interests. Otherwise, as the Third Circuit found in *In re School Asbestos*, the resulting "under-inclusive" class is critically flawed. 789 F.2d 996, 1005 (3d Cir.), *cert. denied*, 479 U.S. 915 (1986).

In re School Asbestos involved an attempt by defendant asbestos-manufacturers to obtain certification of a mandatory, no-opt-out punitive damages class made up of school districts that sought compensation for asbestos property damage. *See id.* at 998. The Third Circuit assumed, without deciding, that there was sufficient justification for creation of a no-opt-out class for punitive damages under Rule 23(b)(1)(B). *See id.* at 1005. Nevertheless, the Court found that, even if such a mandatory class was permissible, the class certified by the district court could not withstand scrutiny because it failed to include numerous other claimants who were likely to seek punitive damages against the defendants. *See id.* The Third Circuit noted that an "under-inclusive" mandatory class necessarily results in a situation where "separate actions by those who should properly be included in the class will go forward." *Id.* at 1006. The Court reasoned that, since the suppression of such separate actions is a key reason for a 23(b)(1)(B) class, the exclusion of critical claimants was fatal to (b)(1)(B) certification. *See id.*

The proposed settlement at issue in this case suffers from the same defect. By its terms, the class excludes all asbestos personal injury claimants who filed their claims prior to August 27, 1993, all asbestos property damage claimants, and all other tort claimants and creditors with present or future claims against either Fibreboard or its insurance policies. *See* App. at 47a-48a (class

includes only those persons with asbestos-related personal injury and death claims who neither filed or settled their claims against Fibreboard before August 27, 1993). Although these people are excluded from the settlement, they are still permitted to proceed with their claims in the tort system. The prosecution of their claims against Fibreboard creates the same risk of "substantial impairment" as the prosecution of the class members' claims against Fibreboard. Since the suppression of such separate actions is the principal purpose of a 23(b)(1)(B) class, their exclusion from the mandatory class settlement in this case renders certification under (b)(1)(B) impossible. *See In Re School Asbestos*, 789 F.2d at 1006.[4]

As the Third Circuit noted in *In Re School Asbestos*, the effect of excluding other similarly situated claimants is to "single out" the class members for "special and possibly disadvantageous treatment." *Id.* at 1006. In this case, only the class members are precluded from suing Fibreboard and required to seek compensation through a private claims processing system. Only the class members are limited to $500,000 in compensatory damages. And only the class members must forego punitive damages, prejudgment interest and post-judgment interest. Those outside of the class -- including other asbestos personal injury claimants -- can seek all of this and more from Fibreboard. Yet, they and the class members share exactly the same risk that separate prosecution of their claims will "substantially impair"

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[4]In *In Re School Asbestos*, the Third Circuit expressed special concern about the exclusion of other property damage claimants. 789 F. 2d at 1005. Because the school districts that the defendants sought to bind into a mandatory class in *In Re School Asbestos* were also property damage claimants, it seemed especially egregious to treat the school districts differently. *See id.* at 1005 ("[t]he certified class does not even include all property damage claimants . . . Clearly [ ] this aspect of the litigation transcends the nation's classrooms.") Similarly, the proposed class in this case includes some, but not all, personal injury claimants against Fibreboard; those individuals who filed claims, but had not yet settled them, prior to August 27, 1993, are not bound by the settlement.

each others' ability to obtain relief from the company. There is simply no principled basis on which the under-inclusiveness of the settlement class can be justified.[5] As a result, certification was improper.

B. Rule 23 (b)(1)(B) Cannot Be Used to Certify a Settlement Class That Precludes Class Members from Obtaining *Any* Relief from the Defendant with the Allegedly Insufficient Funds.

Under the terms of the global settlement agreement at issue in this case, the insurers pay for virtually the entire settlement fund, while Fibreboard contributes no money to the settlement fund and is left with its assets intact.[6] Despite the fact that Fibreboard has agreed to contribute virtually *none* of its own assets to the settlement fund, the global settlement agreement releases both the insurers *and Fibreboard* from all asbestos-related personal injury claims asserted by class members. Because the class members have essentially obtained nothing from Fibreboard in exchange for the release of their claims, the lower courts erred in certifying the proposed settlement class under Rule 23(b)(1)(B).

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[5]In this respect, the proposed settlement is truly unprecedented. *See, e.g., In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718, 727 (E.D.N.Y. 1983), *aff'd*, 818 F. 2d 145, 1429 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988) (involving no-opt-out punitive damages class where *all* of the claims were concentrated in one case); *In re A.H. Robins*, 880 F.2d 709, 717 (4th Cir.), *cert. denied*, 439 U.S. 959 (1989) (where the tort victims' class action against the insurers included all Dalkon Shield claimants, not simply those with unfiled claims as of the date the class-wide litigation was filed).

[6] While the global settlement provides that Fibreboard will contribute $10 million to the settlement fund, the district court pointed out that this "contribution" is, in fact, the amount remaining from Fibreboard's settlement with another insurer. *See* App. at 205a. Moreover, even if this money is viewed as relief obtained from Fibreboard, that makes no difference. It is such an insignificant amount in the context of the litigation that the impropriety in certification remains the same: the class members are receiving dramatically less from Fibreboard than they would otherwise.

As we noted above, the key justification for Rule 23(b)(1)(B) classes is to ensure that class members will actually be able to preserve their ability to obtain a just portion of the "insufficient funds." In this case, however, inclusion of the class members in the settlement class *eliminated* the ability of the class members to seek, much less obtain, their fair share of compensation from Fibreboard. Instead of reducing the risk that Rule 23(b)(1)(B) is designed to address, this settlement class made it a certainty.

According to the record below, Fibreboard's net worth was approximately $235 million at the time of the settlement. *See* App. at 13a. Because the settlement allows Fibreboard to keep all of its assets intact, this substantial pool of assets continues to be available *outside* the settlement fund, *from Fibreboard*, to satisfy claims outside the settlement. On the other hand, once Fibreboard's contribution (or lack thereof) is separated from the insurers', it is clear that there is virtually *no* money available, *from Fibreboard*, *inside* the settlement fund. Since the class members would be hard-pressed to do any worse against Fibreboard "outside" of the settlement, there is no valid justification for precluding the class members from opting out of the class and pursuing their claims against Fibreboard.

In fact, once Fibreboard's and the insurers' situations are viewed separately, it is clear that the only alleged risk to the class members addressed by the Rule 23(b)(1)(B) certification is that posed by the insurance coverage dispute. Moreover, that risk is the *only* impairment risk for which relief is provided in the global settlement agreement. In other words, because Fibreboard has failed to make any meaningful contribution to the settlement agreement, class members are not compensated for any impairment risk that exists with regard to recovery from Fibreboard. As Judge Smith of the Fifth Circuit stated in his initial dissenting opinion in this case, "'the class members appear to have traded Fibreboard's liability for nothing to which they did not already have a right,'" App. at 99a (J. Smith dissenting), quoting John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass*

Tort Class Action ("*Class Wars*"), 95 Colum. L. Rev. 1343, 1420 (1995). Clearly, this is not a proper use of Rule 23(b)(1)(B).[7]

As the above discussion makes clear, even if Rule 23(b)(1)(B) could be utilized where multiple personal injury plaintiffs seek to prosecute claims against a defendant with insufficient funds, certification of the settlement class in this case was improper. Rule 23(b)(1)(B) authorizes certification of a no-opt-out class where the separate prosecution of claims against the defendant creates a risk that the class members' ability to obtain compensation will be "substantially impaired." If the class does not include all of the individuals whose claims create -- and are subject to -- the risk, it cannot be certified. Similarly, Rule 23(b)(1)(B) may not be used to preclude class members from obtaining *any* recovery from the defendant whose financial status creates the risk that class members will not be able to obtain full compensation.

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[7]The significance of Fibreboard's failure to make a reasonable contribution to the settlement fund in this case is confirmed by case law in the closely related area of interpleader actions. *See In Re Joint E. & S. Dist. Asbestos Litigation*, 134 F.R.D. 32, 38 (E. D. N. Y. 1990) ("[l]imited fund class actions closely resemble an interpleader action"); *Newberg* § 1.22, at 1-51 (mandatory classes in general are analogous to interpleader actions) and § 17.15 at 17-38 (the "paradigmatic" example of a Rule 23(b)(1)(B) "limited fund" is an interpleader situation involving competing claimants for limited insurance proceeds). In the interpleader context, it is plainly improper for a defendant-tortfeasor to obtain protection from prosecution on the sole basis that its insurer has filed an interpleader action against the tortfeasors' victims. *See State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523 (1967); *see also Farmers Irrigating Ditch & Reservoir Co. v. Kane*, 845 F.2d 229, 232 (10th Cir. 1988) (fact that insurers sought action in interpleader does not "bootstrap" the tortfeasor; tortfeasor "must stand on its own two feet.") Similarly, Fibreboard cannot use Rule 23(b)(1)(B) to "bootstrap" itself onto what is, in practical reality, the insurers' attempt to reach a settlement with the asbestos claimants.

II. THE INCLUSION OF FUTURE PERSONAL INJURY CLAIMS IN THE CLASS RENDERS THE SETTLEMENT UNCONSTITUTIONAL.

While the no-opt-out certification of this class action is unprecedented and serious cause for alarm, the most notorious -- and constitutionally dangerous -- aspect of this case is its attempt to limit, in one fell swoop, the unaccrued *future* claims of literally hundreds of thousands of individuals who were exposed to asbestos -- and may not even know it. In this sense, this case (like the asbestos future victims' class action struck down by this Court last term in *Amchem*) represents the frightening pinnacle of attempts by defendants to use class actions as vehicles for capping their liability in damages actions.

Although other opt-out class action settlements have sought to encompass the "future" personal injury claims of mass tort victims, *see, e.g., Bowling v. Pfizer*, 143 F.R.D. 141 (S.D. Ohio 1992) (heart valves), the classes in those cases have included persons who could plainly determine -- at the time of certification -- whether they are or are not class members, *i.e.*, whether they do or do not have heart valves. This class goes light years farther by attempting to simultaneously compromise the unaccrued future claims of hundreds of thousands of individuals who are entirely unaware that they have ever been exposed to a hazardous product, let alone that their rights are being extinguished in a class action settlement. If this unique and extraordinary class action is permitted to stand, it will serve as a green light for manufacturers and suppliers of insidiously dangerous products to use Rule 23 as a device for limiting the rights of their "future victims" before those individuals' claims ever accrue. That practice cannot be -- and is not -- constitutional.

Thus, even if a no-opt-out class somehow could be permitted in this case, the settlement class here would still be unconstitutional because it violates the due process rights of future victims in two distinct ways. First, the settlement cannot be reconciled with the future victims' constitutionally mandated right to receive

meaningful notice and the opportunity to be heard. Second, the settlement violates the future victims' constitutional right to receive adequate representation.

A. The Class Settlement Violates the Future Victims' Constitutionally-Mandated Rights to Receive Notice and Have the Opportunity to Be Heard.

In order to ensure that class members' due process rights are protected, Rule 23(e) imposes a *mandatory* notice requirement with respect to "the dismissal or compromise" of *all* class actions, including cases certified under Rule 23(b)(1)(B). *See Walsh v. Great Atlantic & Pacific Tea Co., Inc.*, 726 F.2d 956, 963 (3d Cir. 1983) (Rule 23(e) makes notice in Rule 23(b)(1) and (b)(2) class actions mandatory); Charles A. Wright, et al., 7B *Federal Practice and Procedure*, § 1797 at 365 (West, 2d ed. 1986). Whenever a proposed settlement is reached, the best notice practicable *must* be provided to *all* class members whose rights will be affected -- so they may appear and be heard *before* the proposed settlement becomes final. As one leading commentator has noted, the purpose of this mandatory notice requirement is to ensure that "absent class members are provided an opportunity to contest any action that they feel will adversely affect their rights." *Id.* at 359-60. Indeed, this Court has made clear that adequate notice and the "opportunity to be heard" are essential elements of due process in class action proceedings. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. at 810-13 & n.3; *Advisory Committee Notes*,39 F.R.D. at 107; *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. at 313.

In *Mullane*, this Court stated that to satisfy the demands of due process, the notice to class members must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action *and afford them an opportunity to present their objections*." *Mullane*, 339 U.S. at 314 (emphasis added). Clearly, this constitutionally-mandated requirement that class members be provided notice and an

opportunity to be heard can not be met here, where the class encompasses thousands of future victims who may have no way of knowing that they are included in this settlement.

Indeed, just last term this Court discussed the "highly problematic" impediments to adequate notice in a similar case involving a settlement class action that sought to release the claims of future asbestos victims. *See Amchem*, 117 S. Ct. at 2252; *see also Schweitzer v. Consolidated Rail Corp.*, 758 F. 2d 936, 944 (3d Cir.) (noting that adequacy of notice to potential future asbestos-injury claimants would, at the least, raise "thorny constitutional questions"), *cert. denied*, 474 U.S. 864 (1985). Although *Amchem* did not ultimately decide the issue of the adequacy of class notice for the class in that case, it echoed the observations of lower courts that many of the future victims in the class may not even have known of their asbestos exposure, or realized the extent of the harm they might incur. It also "recognize[d] the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous." *Amchem*, 117 S. Ct. at 2252.

Notably, this Court's discussion of the impediments to adequate class notice in *Amchem* specifically cited Judge Smith's dissenting comments on the deficiencies of the class notice in *this* case. In the excerpt cited by this Court, Judge Smith wrote

> [c]ertification of futures-only class actions creates a massive potential for abuse. Many putative future claimants have manifested no symptoms and do not even know they were exposed. . . . Thus, the due process standbys -- *notice and an opportunity to be heard -- are meaningless to countless future claimants.*

App. at 115a (emphasis added).

As the italicized language suggests, even in a no-opt-out class, due process requires both notice and an opportunity to be heard -- requirements that could not be satisfied in this case in any meaningful fashion. Because many -- if not most -- of the future victims in the class had no way of knowing they were included in the settlement, the notice of settlement in this case fails to withstand constitutional muster.

For these reasons, this case cannot be reconciled with the constitutionally-mandated notice requirement that is embodied in Rule 23. This right was designed to give absent class members the ability to protect their own interests by objecting to a proposed settlement, which this Court has repeatedly recognized to be essential to satisfy the demands of due process. It simply cannot be met in any meaningful way by the settlement class in this case, which seeks to bind the *future* unaccrued claims of hundreds of thousands of individuals who have been exposed to asbestos but may not know it.

B. The Class Settlement Violates The Future Victims' Constitutionally-Mandated Right to Adequate Representation.

The second constitutional infirmity in the proposed settlement is that it deprives the future victims in the class of their due process right to adequate representation. According to Federal Rule 23(a)(4), the class representative must "fairly and adequately protect the interests of the class." Fed. R. Civ.P. 23(a)(4). The drafters of the modern class action rule regarded this requirement as an essential safeguard of the due process rights of class members. *See* 7A *Federal Practice* § 1765, at 263. This Court has since repeatedly affirmed that adequacy of representation is a basic element of due process. *See, e.g., Shutts*, 472 U.S. at 812 ("the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members" (citing *Hansberry v. Lee*, 311 U.S. 32 (1940))); *see also Matsushita Elec. Indus. Co., Ltd. v. Epstein*,

S. Ct. 873, 875 (1996) ("adequate representation is among the due process ingredients that must be supplied if the judgment is to bind absent class members.") (Ginsburg, J., concurring). And just last term, this Court emphasized the importance of the adequacy of representation requirement in a similar case that sought to settle the claims of both present and future asbestos victims. *Amchem*, 117 S. Ct. at 2251.

In *Amchem*, this Court made clear that it did not intend to limit its adequacy-of-representation holding to "opt-out" class actions certified under Rule 23(b)(3). Notably, every case cited by *Amchem* to support its holding on this point involves a mandatory, no-opt-out class. 117 S. Ct. at 2250-51, citing *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982) (mandatory employment discrimination class certified under Rule 23(b)(2)); *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977) (same); *General Tel. Co. of the Northwest v. E.E.O.C.*, 446 U.S. 318 (1980) (same); *In re Joint Eastern and Southern Dist. Asbestos Litig.*, 982 F.2d 721 (2d Cir. 1992) (mandatory asbestos victims class certified under Rule 23(b)(1)(B)), *modified on reh'g on other grounds sub nom. In re Findley*, 993 F.2d 7 (2d Cir. 1993)).

In re Joint Eastern and Southern Dist. Asbestos Litig., relied upon in *Amchem*, is particularly applicable here. Like this case, that decision involved a mandatory, "limited fund" class action certified under Rule 23(b)(1)(B) that included both present and future personal injury victims. *See* 982 F.2d at 728, 735.[8] The Second Circuit vacated the class certification order on the ground

[8] We note, however, that for purposes of invoking Rule 23(b)(1)(B), there is a very important difference between this case and *In re Joint Eastern and Southern District Asbestos Litig.* There, the class settlement served solely to restructure an existing bankruptcy trust. That trust was a "*res*" which the court could equitably distribute without abridging any substantive rights. Here, however, no such pre-existing *res* exists to support certification under Rule 23(b)(1)(B).

that conflicts between various segments of the class rendered the named plaintiffs incapable of satisfying Rule 23(a)(4)'s adequacy-of-representation requirement. *See id.* at 741-43. *Amchem* quotes from that decision extensively in support of its conclusion that intra-class conflicts rendered the named plaintiffs incapable of representing the class. *See* 117 S. Ct. at 2251. Thus, *Amchem* is dispositive on the applicability of the adequacy of representation requirement to mandatory classes.

In reality, the conflict-of-interest problems identified in *Amchem* are even *worse* in a case like this one, where the present and future class members' claims allegedly exceed the available assets. In *Amchem*, it was undisputed that the asbestos companies' assets would be sufficient to pay all claims under the settlement. *See* 117 S. Ct. at 2251. Yet this Court still rejected the certification due to impermissible conflicts between present and future victims. *See id.* In this case, in contrast, the settling parties contend that Fibreboard's liabilities far outstrip its assets. This means that the present and future victims lumped together in the class must battle it out for their share of an inadequate pool of assets – a true zero-sum game. *Amchem* acknowledged that the conflicts between present and future victims in a limited fund context would be at least as serious as those identified in the *Amchem* settlement. *See id.* (finding impermissible intra-class conflicts because, "*[a]lthough this is not a 'limited fund' case certified under Rule 23(b)(1)(B)*, the terms of the settlement reflect essential allocation decisions designed to confine compensation and to limit defendants' liability" (emphasis added)). Thus, this Court recognized – as logic dictates – that its analysis would apply with full force in the limited fund context, as well.

There is, moreover, another, equally compelling reason why the class representatives failed to adequately represent the class: the release of the absent class members' future claims violates the "most fundamental principles underlying class actions, [which] limit the powers of the class representatives to the claims they

possess in common with other members of the class."– Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 Neb. L. Rev. 646, 694 (1994). This restriction is rooted in the basic rationale underlying the adequacy-of-representation requirement: "the court must be satisfied that the class representative, by litigating his or her personal claim, will also necessarily be litigating common claims that are shared by the class." 1 *Newberg* § 1.13, at 1-36.

By restricting class representatives' authority to claims that they hold in common with the entire class, the adequacy-of-representation requirement ensures that the class representatives will achieve the best result possible for the class. Thus, "[w]hen the class representative's claims are the same as or similar to those of the class members, the court may rely in part on the representative's self-interest in prosecuting those claims to protect the interests of the class members." 3 *Newberg* § 3.01, at 3-5.[9] Conversely, "[t]o the extent the plaintiff or class members also have unique individual claims, the plaintiff cannot adequately represent the class on uncommon claims, nor will the adjudication of common issues affect or be binding on the individual uncommon claims possessed by the plaintiff or class members." *Id.* § 1.13, at 1-37 (footnotes omitted).

The Second Circuit followed these principles in *National Super Spuds v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981), which reversed a district court's approval of a class action settlement releasing claims that did not arise out of the facts pled in the complaint. There, the district court had certified a class of purchasers of potato futures contracts who liquidated the contracts

[9] This observation was made in connection with the "typicality" requirement of Rule 23(a)(3), as opposed to the adequacy-of-representation requirement of Rule 23(a)(4). As this Court noted in *Amchem*, however, the two tests "tend to merge" and courts frequently discuss both of them together in their class rulings. 117 S. Ct. at 2251, n. 20, quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. at 157 n.13.

between April 13, 1976, and May 7, 1976. The class members alleged that the wrongful conduct of the defendants had depressed the price of those contracts. Class counsel and the defendant agreed to a settlement that released both the claims alleged in the complaint *and* any claims regarding futures contracts that were liquidated *after* May 7, 1976. Over objections, the district court approved the fairness of the settlement. *See id.* at 15.

The Second Circuit, per Judge Friendly, reversed, holding that the representative plaintiffs were empowered to represent the class "solely with respect to the contracts in which all members of the class had a common interest: contracts liquidated between April 13 and May 7." Judge Friendly added that, "if a judgment after trial cannot extinguish claims not asserted in the class action complaint, a judgment approving a settlement in such an action ordinarily should not be able to do so either." *Id.* at 17-18. Thus, the Second Circuit held that the authority of the representative plaintiffs under Rule 23 to release claims on behalf of the class is limited by the scope of the class complaint, which describes the claims all class members have in common. *See id.* at 18-19; *see also International Union of Electronic, Electrical, Salaried, Mach., and Furniture Workers v. Unisys*, 155 F.R.D. 41, 48 (E.D.N.Y. 1994) ("*National Super Spuds* thus stands for the proposition that a federal district court may not approve a class-action settlement that seeks to release claims that are inadequately represented by the named plaintiffs"); 7B *Federal Practice* § 1797.1, at 41-42 (quoting *National Super Spuds* with approval and noting that, "[i]n evaluating the fairness and reasonableness of any proposed settlement, the court should make certain . . . that the agreement does not impermissibly waive future claims"); Coffee, *supra*, at 1435 ("Judge Friendly's view in *National Super Spuds* that an atypical plaintiff cannot meet the `adequacy of

representation' standard in Rule 23(a) rests on a sound perception of the conflicts of interest that arise under any contrary rule.")[10]

The proposed settlement in this case violates these basic principles by releasing claims that the class representatives do not hold in common with the rest of the class. Although the class representatives and the unnamed class members they purport to represent share a common defendant, the facts relating to the damages of the class members with "future" claims *have not yet occurred* and will necessarily differ from person to person. Given this radical disparity among the future personal injury claims held by the exposure-only class members, the class representatives in this case cannot adequately represent the broad and varying interests of the future victims encompassed by the class settlement with respect to those claims.

For all these reasons, no matter how "fair" this settlement may have appeared to be to the district court in this case, the fact remains that the class representatives lacked any authority to release the unaccrued personal injury claims of the exposure-only class members. Any other result would fly in the face of due process, which forbids absent class members from being bound by

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[10] *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 116 S.Ct. 873, is not to the contrary. There, this Court reversed a decision of the Ninth Circuit refusing to recognize the preclusive effect of a state court class action settlement that released federal claims brought under the Securities Exchange Act of 1934 that the class representatives held in common with the rest of the class and which, under the Exchange Act as construed by the Court, could be released by a state court. 116 S. Ct. at 881-82. In so doing, the Court merely held that the Ninth Circuit erred in refusing to afford full faith and credit to the state court judgment, and did not reach the question of whether the release of federal claims that could not have been pled in the state court proceeding violated due process. In a concurring opinion, Justice Ginsburg stressed that the Court's opinion did not decide whether the class representatives' release of unpled claims violated the absent class members' due process rights, and warned that the issue of adequacy of representation remained open on remand. *See id.* at 885.

a class judgment in which they were represented by individuals "whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent." *Hansberry v. Lee*, 311 U.S. at 45. Thus, the settlement in this case violates the constitutional rights of the class members and should not be permitted to stand.

CONCLUSION

For these reasons, the decision below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1998

ESTEBAN ORTIZ, *ET AL.*,

Petitioners,

v.

FIBREBOARD CORPORATION, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF LEGAL ETHICS, CIVIL PROCEDURE, AND CONSTITUTIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The legal ethics, civil procedure, and constitutional law scholars submitting this brief have no interest in the outcome of the particular lawsuit at bar.[1] They do, however, have a strong interest in the proper application of the fundamental principles of due process in class actions. *Amici* are especially concerned about the preservation of the guarantee of adequate representation by class counsel.

The Fifth Circuit's decision in this case endorses a settlement that denies class members due process and, in particular, declares that class counsel, although burdened with serious intra- and extra-class conflicts, provided adequate representation. We urge this Court to overturn that decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

Class action practice has become free-form and nearly uncontrolled by law. Tens of millions of people are now or have recently been absent class members in one lawsuit or another, yet little may be said with any confidence about their rights. Even the most fundamental questions presently lack answers. When, if ever, does the Constitution require that absent class members be given a right to opt out of a class action? May the opt-out right provided by Fed. R. Civ. P. 23(b)(3) and the "predominance" and "superiority" requirements of that subsection be avoided by adding a request for injunctive relief to money damage claims, or by asserting that a defendant might be forced into bankruptcy before the last absent class member is paid? What are the rights of people who now manifest no injury and have no reason to know or even suspect that they have been exposed to something that might later cause injury? How are they to receive "notice" that a court is about to compromise their inchoate, unknown and unknowable claims? When effective notice appears inherently impracticable and claims for money damages are at stake, does due process

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[1] *Amici curiae* are listed in the Appendix. Letters from all parties consenting to the filing of this brief have been filed with the Clerk. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amici curiae* and their counsel, made a monetary contribution to the preparation or submission of this brief.

require that absent class members be given a full "back-out" right exercisable once injuries manifest themselves? Or in such circumstances are class actions simply forbidden?

This case raises these fundamental questions. Answering them will help put an end to the "anything goes" approach to class actions that unfortunately has developed in some of the lower courts. No legal system worthy of the name can tolerate the use of procedures without boundaries — devices that validate all actions and invalidate nothing. To redeem the class action as a legitimate and constitutional form of process, we encourage the Court to answer more rather than fewer of the central questions raised by this case and to make clear to the courts below and other lower courts that intense situational pressures will never excuse the sacrifice of fundamental procedural safeguards.

This brief, however, is not about all those questions. It is about one: adequacy of representation.

Adequacy of representation is the due process protection that everyone agrees is owed every absent class member in every class action in every court, state and federal. As the central and constant component of due process in class litigation, adequacy of representation must mean something other than that the result is just. *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231, 2248 (1997) (holding that the fairness of the settlement is "an additional requirement, not a superseding direction" to the requirement, among others, of adequate representation). As Judge Smith said in his dissent from the Fifth Circuit's first opinion in this case, "a substantively adequate result cannot cure procedural injustice." *Flanagan v. Ahearn (In re Asbestos Litig.)*, 90 F.3d 963, 1009 (5th Cir. 1996) ("*Ahearn I*") (Smith, J., dissenting), *cert. granted, vacated, and remanded*, 117 S. Ct. 2503 (1997), *on remand*, 134 F.3d 668 (5th Cir.) (per curiam) ("*Ahearn II*"), *cert. granted*, 118 S. Ct. 2339 (1998). Adequacy of representation must also be treated as more than a question of fact left to the discretion of each trial court, subject only to review for abuse of discretion — a point emphasized by Judge Smith in his dissent from the Fifth Circuit's second opinion in this case. *Ahearn II*, 134 F.3d at 675-76 (Smith, J., dissenting).

Here class counsel, no matter how personally honorable, were burdened by two kinds of disabling conflicts: serious intra-class conflicts, as well as obligations to a group outside the class. In addition to these conflicts, class counsel negotiated a settlement of claims which they had no intention, and in all likelihood no ability, to try as a class action. In most if not all situations, that fact alone raises significant questions about the bargaining leverage possessed by class counsel and therefore about their adequacy. Exacerbating all those problems, class counsel reached general agreement on a class settlement with the defendant parties, Fibreboard, and its insurers, before any of the named plaintiffs had agreed to represent the class's interests.

We urge the Court to hold that the intra-class and extra-class conflicts were each serious enough to render counsel inadequate. Further, we urge the Court to address under what circumstances, if any, class counsel who are unable or unwilling to bring a class action to trial may be considered adequate class representatives. We urge the Court to elaborate on what it referred to in *Amchem* as the "representational responsibilities" of those charged with adequately protecting the class's interests. *Amchem*, 117 S. Ct. at 2236. As to the responsibilities of the named plaintiffs, can those responsibilities be met by representatives who enter the case after class counsel and the defendant have reached a settlement in principle?

Whatever other procedural protections exist to protect the absent class members, the guarantee of an adequate lawyer to represent the class is the most important. Class counsel's actions and judgments can independently undermine or buttress each of the other procedural safeguards, including the protection to be afforded by the district court's oversight and scrutiny. For that reason, no matter what other procedural protections must be provided to the absent class, we urge the Court to emphasize class counsel's responsibilities and to begin delineating the conduct and conflicts that fail to satisfy the promise of adequate representation. Because adequacy of representation is the linchpin of due process for absent class members, the Fifth Circuit's *ad hoc*, deferential, apologetic approach to the issue must not be allowed to stand.

With the rights of so many Americans and the integrity of the judicial process at stake, this Court should act to prevent the evisceration of the due process guarantee of adequate representation by class counsel.

ESSENTIAL FACTS

Despite the complicated factual record in this case, only seven factual matters — all uncontroverted — are necessary to an analysis of the due process issues discussed in this brief.

First, defendant Fibreboard selected the lawyers who would subsequently serve as class counsel. Pet. App. 293a-294a (Dist. Ct. Findings of Fact ¶¶ 91-91 (citing Transcript of Fairness Hearings in District Court ("Tr.") 211-14)). Thereafter, Fibreboard, its insurers, and would-be class counsel (the "settlement proponents")[2] constructed the class and structured the terms of the settlement — all before appointment of the class representatives. Pet. App. 383a-384a (Dist. Ct. Findings of Fact ¶¶ 282-83 (citing Tr. 1169-70)). Class counsel never intended, and indeed may not have been able, to certify the class for trial. Tr. 685, 1593.

Second, class counsel contemporaneously represented and settled the claims of approximately 45,000 clients that they placed outside the class. Tr. 588-89, 610. Under the terms of the extra-class settlement, defendant Fibreboard retained one-half of the settlement payment. Judicial approval of the class action settlement would have triggered payment of the retained money. Tr. 610-13.

Third, the class constructed by the settlement proponents includes currently ill people, currently well people who may or may not get sick in the future, and people not yet born or not identifiable (future children of class members and future spouses).

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[2] We refer to these persons collectively as the "settlement proponents" — not the "settlement parties" — because class counsel are not parties and the absent class members, who are, were neither present nor, as we argue here, adequately represented in the construction of this settlement. The courts below, the settlement proponents, and the objectors tend to speak of the "settlement parties" as "agreeing," "negotiating," and "deciding." This way of speaking obscures the central issues in this case.

Pet. App. 544a-545a (Order Provisionally Certifying Class for Settlement Purposes, Sept. 9, 1993). The class does not include all people with future claims; the settlement proponents placed some of them outside the class. Pet. App. 544a-545a (¶ (b) of class definition).

Fourth, Fibreboard's insurance policy with Continental expired in 1959. Some of the class members were exposed to defendant's asbestos products before 1959, and some were exposed only after 1959. Historically, the pre-1959 claims received larger settlement amounts than the post-1959 claims. Pet. App. 415a-416a (Dist. Ct. Findings of Fact ¶ 347).

Fifth, each claimant that the settlement proponents placed outside the class had a present association with class counsel or with another asbestos lawyer. Pet. App. 544a-545a (Order Provisionally Certifying Class for Settlement Purposes, Sept. 9, 1993).

Sixth, although a guardian *ad litem* was appointed for the class as a whole, subgroups with conflicting interests did not have their own guardians. Moreover, the single guardian was appointed after the settlement had been negotiated. Order Appointing Guardian, Oct. 12, 1993; Tr. 1874; *Ahearn I*, 90 F.3d at 972.

Seventh, class counsel finally agreed to file this action under Rule 23(b)(1)(B) only after insurer Continental "brought its checkbook." Tr. 597. The settlement proponents all concede that Continental paid for this class to be certified as a Rule 23(b)(1)(B), non-opt-out, class. Tr. 56, 1445-46, 1572.

ARGUMENT

I. THE EXISTENCE AND SERIOUSNESS OF CLASS COUNSEL'S CONFLICTS OF INTEREST ARE QUESTIONS TO BE REVIEWED *DE NOVO*

The Fifth Circuit treated adequacy of representation as a question of fact, using an abuse-of-discretion review standard to uphold the district court's conclusion that this sprawling class was adequately represented by lawyers purporting to act on behalf of all absent class members. *Ahearn I*, 90 F.3d at 982. In class

actions, however, adequacy of representation is a constitutional guarantee, *Hansberry v. Lee*, 311 U.S. 32, 37 (1940); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985); *Postal Tel. Cable Co. v. Newport*, 247 U.S. 464 (1918); *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U.S. 8 (1907), not a matter of historical fact. *See Cuyler v. Sullivan*, 446 U.S. 335, 342 (1980). On appeal, questions of constitutional moment are not left to the sound discretion of trial judges; they are reviewed *de novo*. *United States v. Bajakajian*, 118 S. Ct. 2028, 2037-38 n.10 (1998) (holding that where the question calls for "the application of a constitutional standard to the facts of a particular case, . . . *de novo* review of that question is appropriate."); *see also Peel v. Attorney Reg. & Disciplinary Comm'n*, 496 U.S. 91, 108-09 (1990).

In *Amchem*, this Court conducted its own review of the divergent interests of class members and concluded that the interests of subgroups within the class clashed enough to make the named representatives, purporting to act for everyone, inadequate. *Amchem*, 117 S. Ct. at 2250-52. In both *Amchem* and this case, the district courts issued detailed findings to the effect that intra- and extra-class conflicts were minimal and legally insignificant. *See Carlough v. Amchem Products, Inc.*, 158 F.R.D. 314, 326-32 (E.D. Pa. 1993); *Ahearn I*, 90 F.3d at 976-82. This Court did not defer to those findings in *Amchem*, and it should not defer to such findings here. As Judge Smith explained:

> The existence of a particular set of circumstances is a factual determination that we review for clear error. Whether those circumstances amount to a conflict of interest is a legal question that we review *de novo* . . . . No factual dispute exists in this case, and therefore we must review the district court's decisions [on the existence of conflicting interests and the provision of adequate representation] *de novo*.

Ahearn I, 90 F.3d at 1010 (Smith, J., dissenting) (citations omitted).

This Court's *de novo* review of the conflicts in *Amchem* is consistent with its approach to conflicts in other settings. In *Cuyler*, this Court held that "whether multiple representation in a particular case gave rise to a conflict of interest . . . is a mixed question of law and fact." *Strickland v. Washington*, 466 U.S. 668, 698 (1984) (summarizing *Cuyler*). *Cuyler* involved a federal habeas corpus challenge to a state criminal conviction in which the ultimate question for the Court was whether due process had been violated on the ground that the defense lawyers had rendered ineffective assistance of counsel.

To answer that question the Court first had to decide whether counsel had engaged in multiple representation at all. The Pennsylvania Supreme Court held they had not. The federal court of appeals had reviewed the record on its own and held they had. This Court held that what the lawyers did was a question of fact, but whether that activity constituted "multiple representation" for purposes of conflict-of-interest analysis was a mixed question of law and fact. *Cuyler*, 446 U.S. at 342. *See also Kimmelman v. Morrison*, 477 U.S. 365, 381-92 (1986); *Strickland*, 466 U.S. at 698-701 (holding that both the performance and prejudice components of an ineffective assistance of counsel claim are mixed questions of law and fact, and reviewing those questions *de novo*).

Thus, in the context of federal habeas petitions — where concerns about federalism, finality, discouraging defense lawyers from serving, and chilling the independence of counsel all weigh against a searching *ex post* inquiry of counsel's performance — this Court has nonetheless held that whether counsel had a conflict of interest and whether it was disqualifying are questions to be reviewed *de novo*. In the present case, in reviewing the adequacy of class counsel's representation in a federal court, federalism is not an issue. [3] Although finality is implicated in collateral attacks on class action judgments, this is a direct appeal. Given the fees

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[3] Federalism issues are involved in other aspects of the case, namely, the massive displacement of state tort law effected by this federal court-approved settlement.

to be made by serving as class counsel, this Court need not worry about chilling the willingness of lawyers to serve.

Most important, in class actions, unlike criminal proceedings, the concern that *de novo* review of the adequacy of counsel's representation will undermine counsel's independence from the court carries little weight. In criminal cases, the basic model of representation is client and lawyer together making the decisions and jointly constructing the representation. *De novo*, non-deferential judicial review of the adequacy of counsel's representation threatens to undermine that model because appellate courts might be too willing to overregulate lawyer conduct and second-guess lawyer decisions. Even so, *de novo* review is the rule with respect to federal habeas petitions.

In class actions, by contrast, Rule 23(e), which substitutes court approval of counsel's decisions for the approval of the absent clients, fundamentally alters the traditional relationship between counsel and the court. The basic model of representation in class actions is one in which the court, rather than the client, monitors counsel's actions. Therefore, concerns about counsel's independence from the court are far less significant in class actions than in criminal proceedings. In sum, there is no excuse for subjecting class counsel's adequacy and alleged conflicts of interest to a less searching review on appeal or in a collateral attack than that accorded similar questions raised in federal habeas petitions.

The Fifth Circuit's deference to the district court on the question of adequacy of representation, wrong under any circumstances, is even more troubling given that the district court's findings were built on a presumption of adequacy that was itself improper. According to the district court, "the fairness of the Global Settlement establishes a rebuttable presumption that Class Counsel adequately represented the Class." Pet. App. 502a (Dist. Ct. Conclusions of Law ¶ 60 (citing, *inter alia*, *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 212 (5th Cir. 1981))). There are two problems with that approach.

First, using the "fairness" finding as a proxy for Rule 23(a)'s procedural protections is precisely the approach this Court rejected

in *Amchem*. *See* 117 S. Ct. at 2248-49. "Rule 23(a)(4) guarantees due process, and a substantively adequate result cannot cure procedural injustice." *Ahearn I*, 90 F.3d at 1009 (Smith, J., dissenting). The Constitution does not promise absent class members fair resolutions, it promises them that they will not be bound to court judgments, however fair those judgments are, unless they have been adequately represented. "Due process must mean something other than the result is just; otherwise some lynchings would be consistent with due process." Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.* ("*Feasting*"), 80 CORNELL L. REV. 1045, 1123 (1995).

Second, "it is difficult to measure the precise effect on a defense [or a settlement] of a representation corrupted by conflicting interests." *Strickland*, 466 U. S. at 693. As Judge Smith put it, "an attorney who negotiated an adequate settlement might have negotiated a better one but for a conflict of interest." *Ahearn I*, 90 F.3d at 1009 (Smith, J., dissenting). *See also* Geoffrey C. Hazard, Jr., *The Settlement Black Box*, 75 B.U. L. REV. 1257, 1266-68 (1995) (noting that a wide range of quite different class action settlements can be considered fair in a given situation). Thus, a presumption of adequacy based on the fairness of the overall settlement is not just wrongheaded as a matter of principle, it is wrongheaded as a matter of fact.

II. CLASS COUNSEL'S CONFLICTS RENDERED THEIR REPRESENTATION INADEQUATE UNDER RULE 23(a)(4) AND THE DUE PROCESS CLAUSE

A. The Intra-Class Conflicts Rendered Counsel and the Named Representatives Inadequate

The class approved by the district court was no more adequately represented than the class in *Amchem*. Here, as in *Amchem*, "the interests of those within the single class are not aligned." 117 S. Ct. at 2251. Just like the *Amchem* class, this one includes people now suffering from life-threatening and fatal illnesses as well as perfectly healthy people who may remain that

way or who may instead become quite ill in the future. "[F]or the currently injured, the critical goal is generous immediate payments." *Id.* For the currently healthy, the critical goal is "an ample, inflation-protected fund for the future." *Id.* These goals plainly conflict. Yet the named representatives, here as in *Amchem*, purportedly represented the interests of both groups at once.[4] As this Court held in *Amchem*, that is inadequate representation. Each group was entitled to one or more named representatives dedicated solely to that group's own interests, not to the good of the class as a whole.

The currently ill and currently well are not the only two groups in the Fibreboard class with interests that pull in opposite directions. In 1959, Fibreboard's insurance policy with Continental expired. *Ahearn I*, 90 F.3d at 1013 (Smith, J., dissenting). Those exposed to Fibreboard's asbestos products after 1959 thus "could only hope to recover from the non-insurance assets of Fibreboard, which amounted to very little." *Id.* Those exposed before 1959, on the other hand, had Fibreboard's insurance against which to assert a claim. That meant pre-1959 claims were substantially more valuable than post-1959 claims. *Id.* at 1013 & n.70 (Smith, J., dissenting). The class settlement — providing that the Trust created to make the payouts to class members would not distinguish between pre-1959 claimants and post-1959 claimants in awarding claimants damages — obliterated this distinction. *Id.* at 1013. A representative dedicated solely to the interests of the pre-1959 claimants would be focused on maintaining the privileged position of those people in any global settlement. The pre-1959 folks had no such champion.

We might all agree with the Fifth Circuit that the "fairest" overall result in this situation, viewed in abstract, would be to wipe out the fortuitously privileged position of the pre-1959 claimants.

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[4] The same can be said of the guardian appointed for the class. Indeed, all arguments in this section apply equally to the guardian appointed late in the process to represent the class as a whole. Because the same conflicts problems discussed in this section plague the guardian in this case, the guardian could no more cure the intra-class conflicts than could any of the other players (the named representatives and class counsel) who purported to act for the class as a whole.

But due process promises the pre-1959 absent class members that their position will be represented. In this context, to be represented means to have one's position advocated by someone who does not owe any substantial loyalty to those whose interests are opposed to one's own. The pre-1959 claimants were denied this. No further showing of adverse effect or prejudice is necessary. *See Amchem*, 117 S. Ct. at 2251 (holding that the denial of separate representation alone was enough to show a denial of adequate representation).

Named representatives are an inadequate solution to the problem. In most class actions the class representatives play very little role in advising on settlement terms, attorney's fees or any other matter. The district court here was right when it recognized that class counsel — not the named representatives — are the key to the class's representation. Pet. App. 483a-484a (citing and quoting other cases, including *Gonzales v. Cassidy*, 474 F.2d 67, 75 (5th Cir. 1973), holding that: "[T]he primary criterion for determining whether the class representative has adequately represented the class . . . is whether the representative *through qualified counsel*, vigorously and tenaciously protected the interests of the class.") (emphasis added by district court).

In *Amchem*, the class representatives knew very little about the details of the settlement and next to nothing about the alleged conflicts of class counsel. *See* Koniak, *Feasting*, 80 CORNELL L. REV. at 1070. Here, the named representatives were not even selected until after a settlement in principle had been reached, and "they relied on Class Counsel in the subsequent settlement negotiations" to finalize the class settlement. Pet. App. 483 (Dist. Ct. Conclusions of Law ¶ 24).

Given the actualities of class action practice, requiring separate named representatives for conflicting subgroups within the class while allowing one group of lawyers to act on behalf of the whole would be pointless. Even assuming that the reference in *Amchem* to named representatives who have a "proper understanding of their representational responsibilities" was meant to signal this Court's disapproval of know-nothing named plaintiffs, in most class actions counsel will retain enormous control over decisions

critical to the absent class members. *See Amchem*, 117 S. Ct. at 2251. For that reason, this Court should emphasize that absent class members are entitled to lawyers, not just named representatives, who are free of serious conflicts — lawyers focused on the relevant subgroup's interests, not on some generalized notion of the good of the entire group.

On remand, the Fifth Circuit's terse opinion points to two distinctions between *Amchem* and this case that supposedly make separate representation unnecessary here: this class is certified under Rule 23(b)(1)(B); and the settlement here does not specify how much money claimants with various illnesses are eligible to receive. *Ahearn II*, 134 F.3d at 669-70. Neither of these distinctions matters.

1. Rule 23(b)(1)(B) certification. As to the Fifth Circuit's first proposed distinction, that certification under Rule 23(b)(1)(B) makes separate representation unnecessary, nothing in Rule 23(a)(4), this Court's cases on the constitutional guarantee of adequacy, nor reason, suggests that the standards for adequate representation are or should be more lax when absent class members are denied the chance to opt out of the proceeding. Indeed, this Court suggested in *Amchem* that in limited fund cases, as this one is alleged to be, the conflicts problem would be exacerbated. 117 S. Ct. at 2251 ("Although [*Amchem*] is not a 'limited fund' case certified under Rule 23(b)(1)(B), the terms of the settlement reflect essential allocation decisions designed to confine compensation and to limit defendants' liability."). *See Walker v. Liggett Group*, 175 F.R.D. 226, 231 (S.D. W. Va. 1997) (reading *Amchem* this way and applying its requirement of separate representation to a class certified under Rule 23(b)(1)(B)).

Equally as important, no one has ever contended that this class was proposed as a Rule 23(b)(1)(B) class because the settlement's negotiators believed at the time that Rule 23(b)(3) could not be used to certify this class. In fact, everyone admits that the Rule 23(b)(1)(B) mechanism was chosen because Continental would not settle unless the absent class members were denied opt-out rights. *Ahearn I*, 90 F.3d at 970. Numerous times during the fairness

hearing (and without contradiction from anyone) the settlement proponents stated that Continental "paid" to get class counsel to accede to promoting this class as a non-opt-out class, meaning that Continental had to add money to the settlement fund to get this result. Tr. 56, 597, 1445-46, 1572. Trading money for opt-out rights may serve the class as a whole in one respect by increasing the total pot of money, but it does so at the expense of those within the class for whom the right to opt out is most valuable — namely, all those who are currently very ill and have no interest in giving up their right to claim punitive damages or their right to collect more than $500,000 through the tort system. That is precisely the kind of trade-off denounced by this Court in *Amchem*.

As this case demonstrates, defendants and class counsel can and do bargain over which subsection of Rule 23(b) to use. No matter how much this Court's opinion in this case clarifies the circumstances in which opt-out rights attach, thereby making it more difficult for defendants and class counsel to bargain over the opt-out rights of absent class members, smart lawyers will undoubtedly find and exploit the areas of grey. This is an unavoidable reality. What is avoidable, however, is the judicial approval of any such bargain when it represents the sacrifice of the interests of absent class members by counsel encumbered by serious conflicts. We thus urge the Court to hold that class counsel who sell the protections put in place for absent class members (*Amchem*'s holdings on predominance, superiority, adequacy and Rule 23(b)(3)'s opt-out rights) as a means of getting the class as a whole a "deal" are rendered inadequate representatives by that conduct alone. At a minimum, such bargaining should raise a presumption that the class was inadequately represented. Moreover, this Court should denounce the Fifth Circuit's approach, which allows a bargained-for class definition to lower the bar of adequacy.

2. Absence of allocation decisions. The Fifth Circuit's other reason for believing that *Amchem*'s conflicts analysis does not apply here is that the settlement does not make allocations based on severity of illness. The Fifth Circuit's per curiam opinion does not explain why this is a cogent distinction. To the extent that we

can make sense of this claim, the Fifth Circuit appears to be saying that the absence of actual allocation decisions in the settlement somehow washes away the conflicts. There are three problems with this claim.

First, it is untrue. The settlement does make allocation decisions among subgroups with seriously divergent interests. Among these are: decisions wiping out the difference between pre- and post-1959 class members, *Ahearn I*, 90 F.3d at 982; the inclusion of so-called spendthrift provisions, which limit payouts in any one year to preserve money for the class members making claims later, *id.* at 973; the $500,000 cap on recoveries and the elimination of the right to claim punitive damages for those who exit to the tort system, *id.*; and the provision that the sickest claimants must get paid 100 cents on the dollar in years in which there are overflow claims, before one cent can be paid to the not-quite-so-sick. *Id.* Indeed, the whole point of the settlement is acknowledged by all to be to protect the currently well from the eventuality that the money will be gone when they get sick. *Ahearn II*, 134 F.3d at 669-70; *Ahearn I*, 90 F.3d at 973; Pet. App. 365a-366a.

Second, delegating the other allocation decisions to the trustees of the Trust to be created under the Global Settlement Agreement for later determination does nothing to cure the conflicts within the class. Consider, for example, the conflict between the "near" and "far" futures. Whenever the allocation decisions are made, the primary goal of the "far futures" would be to guarantee the solvency of the fund and the primary goal of the "near futures" would be to increase payouts now. A lawyer charged with representing the interests only of the "far futures" would argue first and foremost for solvency protections. A lawyer charged with representing "near futures" would resist in the name of larger payouts now. Shifting the conflict to a later point in time does nothing to change it. Counsel who delegate the resolution of conflicting interests to agents (here, the trustees) charged with protecting the interests of the whole are no more adequate than counsel who would delegate that task to named plaintiffs purporting to represent the class as a whole, or counsel who take on that task themselves.

Third, the Fifth Circuit's allocation distinction boils down to this ludicrous proposition: counsel who provide less information and less certainty to absent class members regarding the amount of money they might receive under a settlement thereby render more adequate representation than counsel who provide more information and more certainty. For all its flaws, the *Amchem* settlement at least provided some concrete information on the amount of money absent class members might recover should they eventually develop a certain illness. That was a virtue in the *Amchem* settlement; it was not a problem. The problems of *Amchem* are present here, but the virtue is missing. As it relates to adequacy, the lack of information in this settlement cuts against the quality of representation, not in favor of it.

B. The Extra-Class Conflicts Rendered Counsel Inadequate

As serious as the intra-class conflicts are in this case, they pale in significance to class counsel's extra-class conflicts. Similar conflicts were present in *Amchem*, as the Court's recitation of facts in that case discloses. 117 S. Ct. at 2239 (referring to class counsel's simultaneous representation of their own clients whom they excised from the larger class settlement). The Court did not discuss the issues posed by such conflicts in *Amchem*. It should here.

Simply put, the extra-class conflicts arose in this case, as in *Amchem*, because class counsel represented contemporaneously two sets of clients, namely, clients they put within the class and clients they put outside the class. These two groups of clients received significantly different treatment, with the clients excluded from the class retaining all their due process rights, including an unlimited right to sue in court. In this sense, the clients outside the class got the better deal. No rationale for the classification of these two groups withstands scrutiny other than the fact that everyone put outside the class had an actual attorney-client relationship with class counsel or another asbestos lawyer. The conflicts for class

counsel were thus serious and in fact manifested.[5]

The terms invented by the settlement proponents to describe this class action obscure the seriousness of the extra-class conflicts. Unfortunately those terms — "futures-only class," "futures" and "presents" — have become the language of this case, adopted by the majority and the dissent below and used even by the objectors. To expose the depth of class counsel's conflict, however, we must more carefully define these terms.

In what sense is this class a class of "futures"? There are currently ill people in this class; there are currently well people in this class who may or may not get sick in the future; and there are future people in this class (people who may be born to the current people in the class, and people who may someday marry a class member). As of August 27, 1993, when this class action was filed, absent class members were all "futures" in only one shared sense: they had not yet filed, or settled an unfiled claim, against Fibreboard. One might then justify the term "futures" by explaining that it means persons who may file a claim in the future.

The problem with that explanation is that the "presents" also include persons who may file claims in the future. The class definition excludes from the class not just those who have filed or settled unfiled claims against Fibreboard as of August 27, 1993 (a group that might sensibly have been referred to as "present claimants"), but also people who had settled with Fibreboard for relatively minor injuries but who retained the right to sue Fibreboard in the future should they develop a malignancy. Pet. App. 544a-545a ("[T]he class does not include persons who filed and, for cash payment or some other negotiated value, dismissed

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[5] We do not see how a guardian's approval of the settlement and the processes used to reach the settlement should carry any more weight than the district court's approval of the settlement and those processes. If district court approval of the settlement is no substitute for unconflicted counsel, it necessarily follows that a guardian's approval is no substitute. Even the ethics expert produced by the settlement proponents appeared to accept this proposition. Tr. 2349. Similarly, if a district court's conclusion on "adequacy" is subject to *de novo* review, so too are the guardian's conclusions on this subject on which the district court presumably relied.

claims against Fibreboard, and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy."). At best, those people are half-presents/half-futures with the emphasis on the future half, which represents the more valuable of the two claims. The only sense, then, in which all the "presents" are exclusively "presents" is that *each of them had a present association with an asbestos lawyer*, either as a current client, a past client, or a past client who might well return to that lawyer should that client manifest cancer traceable to asbestos.

This review of what "presents" and "futures" means leads to the following conclusion: in drafting the class definition, class counsel assigned people who were similarly situated, except with reference to their association with class counsel or another asbestos lawyer, to different groups. Some people dying of mesothelioma in the summer of 1993 were assigned to the class, which meant that they and their survivors lost their right to bring suit immediately and to recover more than $500,000 in the tort system or seek punitive damages. Other people dying of mesothelioma in August of 1993, clients of class counsel or another asbestos lawyer, gave up none of those rights. Some people who may develop cancer in the future were assigned to the class; others in the same condition were called "presents" and again retained all their rights.

The class boundary line proposed and supported by class counsel bears no relationship to the common interests of law and fact advanced by the settlement proponents and accepted by the courts below to justify the class action form. The district court found and the Fifth Circuit accepted that the class had the following issues in common:

> *[i]* avoiding the catastrophic results of a loss by Fibreboard in the coverage case appeal; *[ii]* maximizing the total settlement contribution from Fibreboard and the Insurers; *[iii]* streamlining the procedures for the filing, processing, and resolution of claims, thereby reducing transaction costs and delays in compensation; *[iv]* minimizing the percentage of their compensation diverted from the fund to pay attorney's fees; and *[v]*

adopting procedures that provide for payments to claimants in an equitable manner.

Ahearn I, 90 F.3d at 981.

As to each of these issues, the "futures" outside the class and those inside the class were, and remain, identically situated. Every other claimant outside the class was identically situated with respect to all class members concerning every one of these issues except *[iii]*. In fact, those outside the class and those inside the class had the same interest in streamlining the system until class counsel separately settled the claims of the "presents" and agreed to a class boundary that allowed other asbestos lawyers to do likewise. Class counsel cannot seriously claim that a difference they created somehow justifies the difference they created.

The oddly shaped class produced by class counsel's definition not only bears no relationship to the class's common interests, but it subjects similarly situated people to wildly different treatment. Some people exposed to Fibreboard's products get an automatic opt-out from this purportedly "non-opt-out" class, retaining full access to the tort system in the event they develop cancer. Why? Because they are or were once associated with class counsel or another asbestos lawyer. Were this a law that denied access to the courts to everyone exposed to a particular product except those who had had a lawyer settle some other claim for them sometime in the past, there is serious doubt as to whether it would pass muster even under the relatively undemanding rational relationship test for ordinary equal protection and substantive due process challenges. *See, e.g.*, *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 173-79 (1980).[6] Courts must hold unelected,

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[6] This is not to say that the rational relationship test would be appropriate here, where procedural due process rights are at stake. But reference to the test highlights how low a standard of adequacy is implicit in the decision of the courts below. Of course, this is ostensibly the settlement of a judicially cognizable controversy and not legislation. *But see Ahearn I*, 90 F.3d at 1017-19, 1023 (Smith, J., dissenting) (questioning whether this settlement satisfies Article III's "case or controversy" requirement, and labeling it legislative in nature). As we explain in the text, however, the fact that class counsel are less accountable to those they serve cuts in favor of a more stringent standard of conduct, not a weaker or equal standard, and cuts against judicial deference.

largely self-appointed agents, like class counsel, to a higher standard of responsibility than elected and thus more accountable representatives, particularly when the acts of those agents determine the due process rights of those for whom the agents purport to act.

When class counsel were busy negotiating with the defendant parties over the class definition, they had fiduciary responsibilities to all those for whom they purported to speak — their own "presents," the "presents" of others, and those who would later become absent class members. A lawyer who purports to act in this legal capacity on behalf of another thereby assumes responsibilities to that person, including the responsibility to avoid conflicts of interest. See *Westinghouse v. Kerr-McGee*, 580 F.2d 1311, 1319 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978), and cases cited therein. Even the ethics expert produced by the settlement proponents concurred with this proposition. Tr. 2319-20. By agreeing to a class definition that bears no relationship to the common interests of those individuals whose interests counsel was bound to protect, class counsel breached their fiduciary duties. By agreeing to a class definition that arbitrarily preserves the rights of some who may develop cancer in the future and denies similar rights to the rest, class counsel breached their fiduciary duties. By agreeing to what can only be described as a class definition gerrymandered to protect class counsel's own financial interests and the financial interests of other asbestos lawyers, class counsel breached their fiduciary duties. To call such conduct adequate representation is to empty the term of meaning.

Instead of treating the class definition as evidence, if not conclusive proof, of inadequacy, the courts below treated the class boundary line as if it captured categories existing in the natural world. *See, e.g.*, Pet. App. 502a (Dist. Ct. Conclusions of Law ¶ 61). The district court noted that the ethics rules "should not be mechanically applied to the problems that arise in the settlement of class action litigation," Pet. App. 503a-504a (Dist. Ct. Conclusion of Law 65 (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 800 F.2d 14, 19 (2d Cir. 1986))). It then ignored the most salient distinction between conflicts that arise in the "'traditional' lawyer-client context," *id.*, and those inherent in the class action

before it: in class actions the client is constructed by counsel. Class counsel may demonstrate their inadequacy, their willingness to put self-interest or the interest of others above their duty to protect and treat fairly those whom they purport to serve, by choosing to construct one class instead of another. That is what happened here. This gerrymandered class is the artifact of class counsel's conflicts.

The extra-class conflicts in this case do not end with the gerrymandered class. Class counsel negotiated a deal for the so-called "presents" that called for the defendant parties to double payment to those people upon the consummation of a settlement for the "futures." That gave the "presents" and class counsel an interest in a class settlement that was in conflict with the interests of the class. Simply put, class counsel had a duty to the "presents" to get a class settlement — any class settlement — that would survive court review.

As Judge Smith explained in dissent, "[class counsel] and the individual plaintiffs had a financial interest in seeing the class settle on *any terms*." *Ahearn I*, 90 F.3d at 1010 (Smith, J, dissenting) (emphasis in original). By contrast, the class's interest was in the best settlement possible, but only if that settlement was better than no settlement at all. In the absence of a class settlement, the class would be left to face the risk that Continental's assets would be unavailable to meet future claims. Pet. App. 266a-276a (describing coverage dispute between Continental and Fibreboard). In other words, the class would face the risk that Fibreboard would lose the coverage case, leaving it and future claimants without Continental's insurance money. That does not mean, however, that any class settlement was better for the class than no class settlement. It means that the class had no interest in any settlement less lucrative than what it stood to gain by a Fibreboard victory in the coverage case, discounted by the chance that Fibreboard might lose.

By contrast, non-class members had an interest in any class settlement that could win court approval. That is so because the so-called "presents" stood to gain precisely the same amount — the other half of their money — whether Fibreboard won the coverage case or a class settlement was approved. *See Ahearn I*,

90 F.3d at 971 n.3. Thus, for non-class members, any class settlement that a court would approve would be as good as a win in the coverage case, whereas for the class some subset of "settlements that could win court approval" would be worth rejecting.

Making matters worse, for class counsel, any court-approved settlement would be better than, not just equal to, a win in the coverage case. That is so because in the event of a class settlement they stood to gain: (1) their percentage of the contingent half of the "presents" payments; and (2) class counsel fees. A win in the coverage case only ensured class counsel of the first of those payments. Tr. 398-99 (noting that, while class counsel had announced their intention to seek a fee award even if the class settlement was rejected on the ground that they had been instrumental in achieving the Trilateral Agreement, neither Fibreboard nor Continental had agreed to support any such bid for fees). In short, some settlements not in the class's interests were in the interests of both the "presents," to whom class counsel owed a duty, and class counsel themselves.

The conflict created by the contingency built into the "presents" deal did not end with the negotiation of the class settlement. The deal called for court approval of the settlement; class counsel then throughout the fairness hearing had an obligation to their "presents" to win approval, interceding events notwithstanding. The district court papered over the conflicts created by the contingency feature of the "presents" deal by asserting that the fact that the "presents" and class counsel benefitted only from a court-approved class settlement somehow brought the divergent interests of class counsel, the "presents," and the class into harmony. Pet. App. 406a-407a (Dist. Ct. Findings of Fact ¶ 328). The biggest problem with this reasoning is that it ignores the role that the law assigns class counsel in the fairness hearing. *See, e.g.*, *Reed v. General Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983) (one of the six factors to be considered in assessing the fairness of a settlement is "the opinions of the class counsel"). The conflict created by and for class counsel because of the contingent "presents" deal, which they negotiated, cannot be mitigated by the fact that the contingency included winning district

court approval. What class counsel do and fail to do can affect the court's judgments at every stage of the process. It is certainly within the power of settlement proponents to "put one over on the court, in a staged performance." *Amchem*, 117 S. Ct. at 2249 (quoting *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1352 (7th Cir. 1996) (Easterbrook, J., dissenting from denial of rehearing en banc)).

The question to be answered under Rule 1.7(b) of the *ABA Model Rules of Professional Conduct* (1984), which the courts below and all parties agree is the relevant standard for assessing class counsel's conflict, is whether it is reasonable to believe that a lawyer's representation will be materially limited by duties to another or the lawyer's own financial interests. Both in the negotiation of the class deal and in helping to win court approval of this settlement, class counsel's representation of the class was materially limited by the fact that no matter how much in the class's interests a certain action might have been, class counsel's duties to their "presents" prevented counsel from doing anything that would jeopardize the class settlement or cause the district court to reject the settlement. Class counsel in that position is not an adequate representative. *Fiandaca v. Cunningham*, 827 F.2d 825 (1st Cir. 1987) (disqualifying class counsel because of counsel's conflicting obligations to another concurrently represented class).

Finally, to justify its holding that class counsel acted appropriately in simultaneously negotiating with the defendant parties on behalf of the class and another group, the district court cited *Holden v. Burlington Northern, Inc.*, 665 F. Supp. 1398, 1426-27 (D. Minn. 1987). *Holden* involved an employment discrimination case brought under Rule 23(b)(2). While negotiating the *Holden* settlement, class counsel also negotiated the settlement of six other cases that they were litigating against the same defendant. *Id.* at 1425. The *Holden* court relied on the fact that the class notice had disclosed counsel's role in the other litigation. *Id.* at 1426. We do not believe that notice should ever substitute for unconflicted counsel. Moreover, if notice of the conflict could ever cure the problem, it would surely not cure the

problem in a case where the class was composed largely of people unlikely to be aware of their relationship to the proceeding because they were not yet ill and were unaware that they had been exposed to a dangerous substance.

Dissenting in this case, Judge Smith advocated a ban on parallel representation by class counsel, and for the reasons he gave we support his position. *Ahearn I*, 90 F.3d at 1011. *See also* Comment to Rule 1.7(b) of the *Massachusetts Rules of Professional Conduct* (1997) (banning simultaneous representation in class actions). Here, however, class counsel's representation raised more problems than mere parallel representation. Class counsel created a gerrymandered class that can only be understood as designed to serve the interests of non-class members (their clients outside the class), by assigning similarly situated people to groups destined to receive disparate treatment, with absent class members on the losing side of that equation. Class counsel negotiated a deal for the class that gave class counsel and their *other* clients an interest in whether a class settlement was reached, thereby disabling class counsel during the class negotiations and the subsequent fairness hearing from doing anything but pushing this settlement forward. If such representation counts as adequate representation, this Court might just as well announce that absent class members are not entitled to counsel at all.

III. THE FEWER OTHER PROCEDURAL PROTECTIONS AFFORDED CLASS MEMBERS, THE MORE DEMANDING MUST BE A COURT'S SCRUTINY OF CLASS COUNSEL'S INDEPENDENCE, LOYALTY, DILIGENCE, AND COMPETENCE

"Class counsel confined to settlement negotiations [cannot] use the threat of litigation to press for a better offer." *Amchem*, 117 S. Ct. at 2248-49 (citing John C. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1379-80 (1995)). It is undisputed here that counsel had no intention of seeking to have this class certified for trial. Tr. 685, 1593. In negotiating a settlement, counsel unable or unwilling to go to trial have little, if any, leverage at the bargaining table.

Here, the settlement proponents claim that external events, such as the impending decision in the coverage case, more than compensated for class counsel's otherwise weak bargaining position. The courts below accepted that argument. But the uncertainty about insurance coverage does nothing to show that this particular group of plaintiffs' lawyers had any leverage. If the would-be class counsel resisted defendant's demands, the defendant could have threatened to find another, more cooperative plaintiff's lawyer with whom to make a deal. If plaintiff's counsel cannot threaten to go to trial at that point, would-be class counsel has only two choices: capitulate to the defendant's demands or watch the defendant find some other lawyer who will do so, making that new lawyer the one eligible for class counsel fees.

Here, the settlement proponents asserted, and the courts below accepted, that the Ness Motley firm had to be class counsel for a class settlement to be credible. Pet. App. 293a-294a (Dist. Ct. Findings of Fact ¶¶ 91-92); *see also Ahearn I*, 90 F.3d at 989. Whether Ness Motley's participation was so necessary that it made up for counsel's inability to go to trial is, however, not a question ruled on by the courts below. It should have been.

In *Amchem* this Court suggested that a class unmanageable for trial could nonetheless be certified for settlement, which means that class counsel unable to proceed to trial might nonetheless be adequate. 117 S. Ct. at 2247. In *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 373-87 (1996), this Court held that a class action settlement may include claims that cannot be tried by the court certifying the class, which implies that class counsel who settle claims that they could not bring to trial, at least not in their chosen forum, may be adequate.

When the defendant's assent is necessary to class counsel's obtaining certification of the class action, as it is with every so-called "settlement class" that is unfit for trial certification, the defendant is free to shop around for the plaintiff's lawyer willing to sell out the class for the least money. Plaintiff's lawyers are thus encouraged to compete for lucrative positions as class counsel based on their disloyalty to the class. *See* Coffee, *supra*, at 1347-48 (describing this race to the bottom). To preserve the guarantee

of adequate representation from the perverse incentives created by a world in which settlement class actions are routine, this Court could hold that no class can be certified for settlement that could not be certified for trial. Alternatively, this Court could hold that the requirements of Rule 23(a)(4) may be met as long as a court finds that the class might be able to be certified for trial — a finding that would be reviewed by the trial court *de novo* if the settlement failed and the defendant chose to fight certification. Finally, the Court could hold that a presumption of inadequacy attaches whenever counsel present a settlement for approval on behalf of an inchoate class that appears to be uncertifiable for trial purposes. To overcome this presumption, class counsel would have to provide convincing evidence that something else provided counsel with leverage comparable to that counsel would have been able to wield by threatening trial.

As a group, we take no position on the first two options. At a minimum, however, the Court should adopt some form of our third option. The courts below treated class counsel's inability or unwillingness to proceed to trial as calling for no special scrutiny of counsel's adequacy. We urge the Court to reject that approach.

As mentioned earlier, the named representatives in this case were not selected until counsel had reached a settlement in principle, and thereafter the named representatives contributed little, if anything, to the settlement process. This Court should consider whether named representatives who are so uninvolved can ever be adjudged adequate. If not, what level of involvement is expected of the named representatives? At a minimum, this Court should make clear that when named representatives amount to little more than figureheads, class counsel's performance and potential conflicts will be scrutinized much more carefully.

The fewer other procedural protections are accorded absent class members, the more pressure is placed on the concept of adequacy as the centerpiece or only piece of due process. This Court should emphasize that inquiry into class counsel's adequacy must be all the more stringent whenever other procedural protections are lacking, as in non-opt-out classes, or less reliable, as in the case of notice given to a futures class.

The loose standards employed to judge the adequacy of class counsel's representation in this case are unfortunately more the norm than the exception. All too often, scrutiny of class counsel's adequacy is perfunctory, a practice this Court should denounce as inappropriate even in those cases where other procedural protections are provided to absent class members. Throughout this brief we have been careful to avoid language that would suggest that an inadequate class lawyer is the equivalent of an unethical lawyer. First, we do not believe that the due process guarantee is coextensive with any particular version of the ethics rules. *See Strickland*, 466 U.S. at 688-90. Second, court review of class counsel's adequacy may be less than vigorous in part because judges are loathe to pronounce lawyers "unethical." We have been careful to speak of counsel's adequacy as a matter of due process and not as a matter of morality. This way of speaking may help the lower courts take the entire business more seriously and approach the task with less hesitancy.

CONCLUSION

The Fifth Circuit's decision should be reversed.

Respectfully submitted.

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* For identification purposes only; the positions set forth in this brief are solely those of *amici*.

** Roger C. Cramton and Susan P. Koniak did not participate in any capacity in the present case. They were expert witnesses on behalf of the objectors at the fairness hearing in *Carlough v. Amchem Products, Inc.*, 158 F.R.D. 314 (E.D.Pa. 1993), which reached this Court as *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997). The counsel who hired them in *Amchem* are also representing the objectors in the instant case.

(13)

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Supreme Court of the United States

OCTOBER TERM, 1997

ESTEBAN ORTIZ, ET AL.,

Petitioners,

v.

FIBREBOARD CORPORATION, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For the Fifth Circuit

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONERS

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IN THE

Supreme Court of the United States

October Term, 1997

No. 97-1704

ESTEBAN ORTIZ, ET AL.,

Petitioners,

v.

FIBREBOARD CORPORATION, ET AL.,

Respondents.

On Writ Of Certiorari To The United State Court of Appeals for the Fifth Circuit

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BRIEF OF AMICUS CURIAE THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF PETITIONERS

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] is a voluntary national bar association whose approximately 50,000 members primarily represent plaintiffs in civil actions. Victims of asbestos-related disease are frequently represented by ATLA members in their civil suits.

Letters of consent of the parties to the filing of this brief have been filed with the Court.[1]

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[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than

ATLA does not appear before this Court as an opponent -- or a proponent -- of class actions in mass torts. Rather, ATLA's concern in this case is defined by its longstanding mission, stated in its bylaws: "To preserve the constitutional right to trial by jury." ATLA declared its position regarding class actions in a formal resolution adopted by its Board of Governors on Oct. 5, 1996:

> Class actions can be important procedural vehicles utilized by consumers and others to halt and deter wrongful conduct. However, class actions have the potential to affect individual rights, and potentially may interfere with an individual plaintiff's exercise of the right to legal counsel and the right to trial by jury. . . .
>
> ATLA believes . . . that any waiver of the right to a jury trial should be a knowing and informed choice of the plaintiff [and] that plaintiffs are entitled to counsel of their choice whose loyalty is undivided by any conflict of interest. Accordingly, ATLA opposes the implementation of class action procedures unless each claimant is afforded the fullest opportunity to exercise a knowing and intelligent waiver of jury trial and a meaningful opportunity to opt out of the binding effect of such proceedings.

In ATLA's view, affirmance of the Fifth Circuit decision would permit the misuse of class actions to eliminate the jury trial rights of future victims long before they are in a position either to exercise or intelligently waive their constitutionally guaranteed rights.

SUMMARY OF THE ARGUMENT

1. The lower court's certification under Fed. R. Civ. Pro. 23(b)(1) of a mandatory class of future claimants against Fibreboard Corp. for injury caused by asbestos and its

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amicus curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

approval of a settlement that transfers those claims to an administrative process violate the claimants' right to trial by jury and the Rules Enabling Act.

2. The history of the Seventh Amendment demonstrates that the right to trial by jury was designed as a check on the power of government officials, and federal judges in particular. The right also safeguards the individual's interest in controlling his or her own litigation and preserves the jury as an institution of democratic self-government. The class action settlement in this case undermines each of these goals.

3. The Rules Enabling Act prohibits application of Rule 23 to abridge a substantive right, including the right to trial by jury.

The class action settlement in this case shifts the legal claims of asbestos victims, to which the Seventh Amendment applies, to an administrative compensation scheme where it does not. This is a type of denial of jury trial rights that the Seventh Amendment was specifically designed to prevent, and this Court has invalidated an attempt by Congress to evade the right to trial by jury in similar fashion.

The lower court's extension of Rule 23(b)(1) to class members whose actions at law will not accrue until some time in the future violates the constitutional protection requiring that any waiver of the jury right be knowing and intelligent.

The mandatory class action settlement of the class members' state law claims abridges state constitutional rights in violation of the Rules Enabling Act. Those include the right to trial by jury and the "open courts" guarantees in most state constitutions.

4. The "back-end opt-out" provided in the proposed settlement does not satisfy the Seventh Amendment. The plan burdens the exercise of the jury right by requiring claimants to submit to mediation and arbitration procedures before they can opt out. The plan discriminates against

claimants who have exercised their right to jury trial by requiring successful plaintiffs to wait years longer for compensation payments than claimants who choose mediation or arbitration.

The most egregious constitutional deficiency in the back-end opt-out is the ceiling of $500,000 on recoverable damages. Where the Seventh Amendment applies, the amount of damages is to be determined by the jury. A cap on the amount of damages that can be awarded is inconsistent with the Seventh Amendment. State courts have held that damage caps, even those that limit only noneconomic damages, violate state constitutional guarantees of the right to trial by jury.

5. The class action settlement could have been structured to achieve its goals while preserving the right of future claimants to trial by jury. It could have provided that claimants may choose between the settlement process and filing a tort action under state law at the time when such a tort action could be filed. Generally, this would permit claimants to make an informed choice to exercise or waive their jury trial rights during the state statute of limitations period, starting from the date when the claimant knew or should have known of the asbestos-related disease. Such a provision would have preserved the claimants' constitutional rights without crippling the class action settlement.

ARGUMENT

I. INTRODUCTION.

In the coming years, a significant number of Americans who are presently in good health will receive bad news from their doctors. They will have developed cancer, mesothelioma, or other disease caused by asbestos contained in the products made by Fibreboard for 50 years. If the settlement at issue in this case is approved, these future asbestos victims will get a second dose of bad news from

their attorneys. Their right to seek legal redress against Fibreboard and to put their case before a jury selected from the community will have been traded away years earlier. They will find they have been locked out of the courthouse by a deal struck by Fibreboard, its insurers, and attorneys they have never met.[2]

The class action settlement in this case resembles in many respects the settlement this Court rejected in *Amchem Products, Inc. v. Windsor*, ___ U.S. ___, 117 S. Ct. 2231 (1997). As in *Amchem*, the class action settlement in this case

> would extinguish asbestos-related causes of action of exposed individuals who currently suffer no physical ailments, but who may, in the future, develop possibly fatal asbestos-related disease. These "futures claims" of "exposure-only" plaintiffs would be extinguished even though they have not yet accrued.

Georgine v. Amchem Products, Inc., 83 F.3d 610, 617 (3rd Cir. 1996), *aff'd sub nom. Amchem Products, Inc. v. Windsor*, ___ U.S. ___, 117 S. Ct. 2231 (1997).

Extinguished too are the constitutional rights of those plaintiffs to trial by jury of their tort causes of action. In *Amchem*, this Court held that the proposed class action settlement could not satisfy Fed. R. Civ. Pro. 23(a) and 23(b)(3). The Court therefore did not specifically address the command of the Seventh Amendment that the right to trial by jury be preserved.

The lower court in this case claimed to find sufficient distinctions between the class action settlement in this case, certified under Rule 23(b)(1), and the one condemned in

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[2] Without disparaging the great effort that went into negotiating this deal, one can imagine the consternation of future victims to learn that the bargain was struck, not in the halls of Congress or even in this august Court, but at a gathering of lawyers in a coffee shop in Tyler, Texas. *See Flanagan v. Ahearn*, 90 F.3d 963, 971 (5th Cir. 1997).

Amchem. Flanagan v. Ahearn, 134 F.3d 668, 670 (5th Cir. 1998).

ATLA respectfully submits that the lower court's extension of Rule 23 to approve this class action settlement violates the class members' right to trial by jury and therefore exceeded the court's authority under the Rules Enabling Act. ATLA further submits, in Part IV, infra, that the settlement's "back-end opt-out" does not satisfy the Seventh Amendment. Finally, ATLA suggests in Part V, infra, that the settlement could have been configured to preserve the right to trial by jury without eliminating the benefits of the class action.

II. THE CLASS ACTION SETTLEMENT UNDERMINES VALUES THAT THE SEVENTH AMENDMENT WAS ADOPTED TO PROTECT

The Seventh Amendment guarantees the right to trial by jury in civil cases.[3]

This Court has repeatedly emphasized that

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Dimick v. Schiedt, 293 U.S. 474, 486 (1935), quoted in *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 501 (1959); and in *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry,* 494 U.S. 558, 565 (1990). This Court "has carefully preserved the right to trial by jury where legal rights are at stake." *Terry, supra*, at 565.

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3 In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

U.S. Const., amend vii.

The scope and effect of the Seventh Amendment "are determined by reference to the historical setting in which the Amendment was adopted." *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 339 (1979)(Rehnquist, C.J., dissenting). Sadly, Americans' right to trial by jury has suffered a "gradual process of judicial erosion." *Id.* At times it has even become the object of disparagement, perhaps because its history has become overlooked or unappreciated. *See* Stephan Landsman, *The Civil Jury In America: Scenes From an Unappreciated History,* 44 Hastings L.J. 579 (1993).

The history of the Seventh Amendment demonstrates that it was designed to protect fundamental values that the class action settlement in this case undermines.

A. The Seventh Amendment Was Adopted As a Check On The Power Of Government, And On The Power Of Federal Judges In Particular.

The jury trial is not merely a procedural feature of our civil justice system. A war was fought, and lives lost, to win this right. The jury was immensely popular among the American colonists. They admired the heroism of Edward Bushnell and the other jurors who refused to convict Quaker William Penn in 1670, though the jurors were fined and jailed by the trial judge. *See* John Guinther, THE JURY IN AMERICA ch. 1 (1988).

The colonists rejoiced when a jury in 1688 acquitted seven Anglican bishops of seditious libel for opposing James II. The case confirmed their view of the jury "as a bulwark of liberty, as a means of preventing oppression by the Crown." Austin Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 Harv. L. Rev. 669, 676 (1918). "Treatises extolling the jury flooded the market and profoundly influenced eighteenth century American as well as English views about jury trial." *Id.*

The colonists cheered the jury verdicts -- including large punitive damage awards -- in the civil suits by John Wilkes and his printer against officials who conducted an illegal

search in their effort to suppress Wilkes' criticism of the government. *Wilkes v. Wood*, Lofft 1, 98 Eng. Rep. 489 (K.B. 1763), and *Huckle v. Money*, 2 Wils. 205, 95 Eng.Rep. 768 (C.P. 1763). "Wilkes' case and his ongoing conflicts with the British administration were a matter of keen interest in the American colonies." Landsman, *supra*, at 591. The Wilkes verdict was cited in debates in support of the need for constitutional protection of the civil jury. *See* PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1778-1788, 781-82 (John B. McMaster & Frederick D. Stone, eds. 1988)(statement of Robert Whitehall at Pennsylvania ratifying convention).

Indeed, this constitutional guarantee was critical to ratification of the Constitution itself. On Sept 12, 1787, as the Constitutional Convention was ending its work in Philadelphia, James Wilson "observed to the House that no provision was yet made for juries in Civil cases and suggested the necessity of it." A motion to add that right to Art. III, §2, cl.3, which guaranteed trial by jury in criminal cases, failed. Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 293-94 (1966). That omission suggested to many that the constitution represented "virtual abolition of the civil jury" and very nearly doomed ratification of the entire constitution. Henderson, *supra*, at 295-98; Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 672 n.89 (1973).

Proponents of the right viewed the jury as an essential check on the power of federal judges. Morris S. Arnold, *A Historical Inquiry Into the Right to Trial By Jury in Complex Civil Litigation*, 128 U. Pa. L. Rev. 829, 832-35 (1980). During the ratification debates in the various states, the Antifederalists insisted that a constitutional guarantee of trial by jury in civil cases was necessary to shield the people from a national government and an unelected federal judiciary that would be too far removed from the values and concerns of ordinary citizens. James S. Campbell and Nicholas Le Poidevin, *Complex Cases and Jury Trials: A Reply to*

Professor Arnold, 128 Univ. of Pa. L. Rev. 965, 971 (1980); *see, e.g.* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 218 (J. Elliot 2d ed. 1836)(remarks of James Monroe at the Virginia ratification convention). Ultimately, as Justice Story recounts, the Federalists' commitment to a Bill of Rights, including jury trials in civil cases, won support for the new constitution. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 445 (1830).

> The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343 (1979) (Rehnquist, C.J., dissenting). *See also, Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 82 (1989) (White, J., dissenting) (a principal rationale for the Seventh Amendment was that "juries serv[e] as popular checks on life-tenured judges.")

Yet, over 200 years after this battle was won, asbestos victims may find that their jury rights were traded away in a deal struck by private attorneys with the active participation of the district court. In Judge Smith's forceful description, "Federal courts are not roving engines of justice careening about the land in search of wrongs to right." *Flanagan v. Ahearn*, 90 F.3d 963, 1015 (5th Cir. 1997) (Smith, J., dissenting). The Seventh Amendment exists, ATLA would add, because of the ease with which federal courts may become engines of injustice.

B. The Seventh Amendment Preserves Individual Control Over a Cause Of Action.

The Seventh Amendment recognizes that the various means of settling disputes are not fungible. To present one's grievance to a jury from the community is qualitatively different from mediation or arbitration, even where the amount of compensation is comparable.

Tort victims in particular have a "vital interest" in having some measure of control over litigation that may affect their lives. *Yandle v. PPG Indus. Inc.*, 65 F.R.D. 566, 572 (E.D. Tex. 1974); *Causey v. Pan Am World Airways, Inc.*, 66 F.R.D. 392, 299 (E.D. Va. 1975); *Hobbs v. Northeast Airlines*, 50 F.R.D. 76, 79 (E.D. Pa. 1970); Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. Rev 193, 286-87 (1992). *See also* Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. Ill. L. Rev. 69, 74 ("the right to control personally the suit whereby a badly injured person seeks redress from the alleged tortfeasor has long been valued both here and in England.").

Studies of litigants reveal that their interest in seeking a jury trial goes beyond the amount of compensation recovered. In one empirical study, for example, claimants whose cases went to trial were more likely to report that justice and fairness were accomplished, compared to those whose cases were disposed of through arbitration or other means. Deborah R. Hensler, *Resolving Mass Torts: Myths and Realities*, 1989 U. Ill. L. Rev. 89, 99. Significantly, the "most frequently cited objective of lay litigants in adjudicatory proceedings was to 'tell my side of the story.'" *Id.* Other case studies confirm that plaintiffs who seek access to judicial remedies "seek something in addition to money." Judith Resnik, Dennis E. Curtis, Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. Rev. 296, 363-72 (1996).

This Court has recognized Americans' "deep-rooted historic tradition that everyone should have his own day in court." *Richards v. Jefferson County*, 116 S. Ct. 1761, 1766 (1996); *Martin v. Wilks*, 490 U.S. 755, 762 (1989). The status of the right to trial by jury as a constitutional right which may be waived only by a knowing and intelligent choice, (see part III, B, *infra*), ensures that an injured party will have at least some control over the adjudication of his or her claim.

As this Court pointed out in *Amchem*, this interest should weigh heavily in the decision to certify -- or to deny certification -- of a class under Rule 23:

> The Advisory Committee for the 1966 reform anticipated that in each case, courts would "consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit." Adv. Comm. Notes, 28 U.S.C. App., p. 698. They elaborated:
>
> > The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action.

Amchem, 117 S. Ct. at 2246. An earlier Fifth Circuit panel admonished that the right to opt out of a class action "is required . . . where personal monetary relief is being sought [because] the individual class members may have a strong interest in pursuing their own litigation." *Penson v. Terminal Transport Co.*, 634 .2d 989, 993 (5th Cir. 1981).

Yet the class members in this case who develop asbestos disease will discover their causes of action have been "kidnapped," and they have been "deprived of any freedom of action by being drawn involuntarily into collective litigation." Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 Cornell L. Rev. 811, 821 (1995).

C. The Seventh Amendment Preserves the Jury As An Instrument Of Self-Government.

The Seventh Amendment was not adopted solely for the benefit of litigants. The right to sit on a jury was viewed as a political right of immense importance to independence and self-government. *See, e.g.*, Vidram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 Cornell L. Rev. 203, 218 (1995); Stephan Landsman, *The Civil Jury In America: Scenes From an Unappreciated History*, 44 Hastings L.J. 579, 595-97 (1993); Alan Howard Scheiner,

Judicial Assessment of Punitive Damages, and the Politics of Jury Power, 91 Colum. L. Rev. 142, 144-49 (1991).

In early colonial times, the jury often acted as the central instrument of governance. Its wide-ranging activities starkly contrasted with the circumscribed operations of both the royal executive and the colonial legislature. *See* William E. Nelson, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 (1975).

Spokesmen on all sides of the ratification debate recognized that the jury box as well as the ballot box were fundamental prerequisites to democratic self-government. The ratification debates abounded with analogies between legislatures and juries. Akhil Reed Amar, *The Bill of Rights as a Constitution,* 100 Yale L.J. 1131, 1186, 1188 (1991).

The Antifederalists in particular argued that popular representation in the judicial branch -- through juries -- was essential so that national laws, adopted by persons unfamiliar with local circumstances, would be modified in their application by representatives better acquainted with local needs and customs. Carol M. Rose, *The Ancient Constitution vs. The Federalist Empire: Anti-Federalism From the Attack on "Monarchism" to Modern Localism*, 84 N.W. U. L. Rev. 74, 91-92 (1989). To the antifederalists, the absence of the civil jury "would fatally weaken the role of the people in the administration of government." Herbert Storing, WHAT THE ANTI-FEDERALISTS WERE FOR 19 (1981). Hence, Alexis de Tocqueville observed, "the jury is, above all, a political institution, and it must be regarded in that light in order to be duly appreciated." 1 Alexis de Tocqueville, DEMOCRACY IN AMERICA 293 (Bradley rev. ed. 1945)

In short, the Seventh Amendment was designed to protect not only the civil right to have one's case tried to a jury, but also the political right to serve as a juror, a right that has been recognized by this Court. *See Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2085 (1991); *Dimick v. Schiedt*, 293 U.S. 474, 485-86 (1934); *Galloway v. United States*, 391 U.S. 372, 397-400 (1943)(Black, J., dissenting).

As then-Justice Rehnquist has noted that trial by jury was important to the founders because they valued the jurors' common sense and their ability to administer the law according to the wishes of the community. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 344 (1979)(Rehnquist, J., dissenting). He added:

> the right to a jury trial was not guaranteed in order to facilitate prompt and accurate decision of lawsuits. The essence of that right lies in its insistence that a body of laymen not permanently attached to the sovereign participate along with the judge in the factfinding necessitated by a lawsuit.

Id. at 348-49.

Yet the class action settlement which is before this Court, however, largely walls off public participation, turning the claims over to the TDP ("Trust Distribution Process").

II. THE LOWER COURT DEPRIVED FUTURE CLAIMANTS OF THEIR RIGHT TO TRIAL BY JURY IN VIOLATION OF THE SEVENTH AMENDMENT, STATE CONSTITUTIONAL GUARANTEES AND THE RULES ENABLING ACT.

A. The Seventh Amendment Precludes Shifting Common Law Claims To A Non-Jury Tribunal.

The claim of an asbestos victim for monetary damages for personal injury is clearly within the Seventh Amendment guarantee of the right to trial by jury in "suits at common law." *Curtis v. Loether*, 415 U.S. 189, 196 (1974). By a perverse alchemy, the class action settlement transforms this constitutional right into little more than a coupon, redeemable only at Respondents' TDP. The alchemy in question is the lower court's breathtakingly broad extension of Fed. R. Civ. Pro. 23(b)(1) to exposure-only individuals, whose claims will accrue sometime in the future, while

limiting their recourse to the fund that Fibreboard and its insurers are willing to put up in the present.

In *Amchem*, this Court emphasized that Rule 23 must be interpreted in keeping with the Rules Enabling Act. 117 S. Ct. at 2244. When Rule 23 was adopted in its present form in 1966, the Act provided that the rules

> shall not abridge, enlarge or modify any substantive right *and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.*

28 U.S.C. § 2072 (1958 ed.)(emphasis added).[4]

As to these future victims of asbestos-related disease, ATLA submits, their right to trial by jury has been abridged and has not been "preserved."

A primary grievance of the American colonists was the extensive effort by England to avoid jury adjudications by moving civil and criminal disputes from colonial courts, where local juries sat, to Vice-Admiralty courts and other non-jury tribunals administered by judges beholden to the Crown. *See* Carl Ubbelohde, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION 209-11 (1960); Roscoe Pound, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 69-72 (1957); Wolfram, *supra*, at 654. The colonists complained bitterly of this infringement through the Stamp Act Congress, the Continental Congress, and, finally, in the Declaration of Independence. Landsman, *supra*, at 595-97.

This Court addressed an analogous situation in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). Congress had authorized the district courts to refer claims of

[4] The Rules Enabling Act was amended in 1988, and the specific reference to the jury right was omitted. The clause apparently was deemed superfluous; Congress could not and did not authorize rules of procedure that violate the Seventh Amendment. David D. Siegel, Commentary on 1988 and 1990 Amendments, 28 U.S. C.A. § 2072 (1991).

fraudulent conveyance, which could otherwise be adjudicated by the district court, to Bankruptcy Courts. This Court held that neither Congress nor the courts may strip claimants asserting "private rights" of their Seventh Amendment guarantee of trial by jury merely by transferring the claims to a non-jury tribunal.

Justice Brennan, writing for the majority, explained that Congress may assign statutory claims involving "public rights," -- matters in which the government is a party or which are closely intertwined with a federal regulatory program -- to a forum in which jury trials are unavailable. But in "private tort, contract, and property cases," Congress may not deprive litigating parties of the Seventh Amendment's guarantee to a jury trial. 492 U.S. at 51 & 53.

Although the Court's language is directed at the power of Congress, it seems clear that the Seventh Amendment would prohibit with even greater force the attempt by a single federal judge to "conjure away the Seventh Amendment by mandating that traditional legal claims be . . . taken to an administrative tribunal." *Id. See also* G. Ray Warner, *Rotten To the "Core": An Essay on Juries, Jurisdiction and Granfinanciera,* 59 U.M.K.C. L. Rev. 991, 1011 (1991).

In this case, the class action settlement seeks to transfer, prospectively, common law claims that otherwise would clearly be subject to the Seventh Amendment to a forum in which juries are not available. Absent a valid waiver, this deprivation of future claimants' right to trial by jury clearly violates the Seventh Amendment, and, additionally, the Rules Enabling Act.

B. The Class Action Settlement Violates the Constitutional Requirement That Waiver of the Right to Trial by Jury Be Knowing and Intelligent.

A party may, of course, waive the right to a jury trial. That choice must be knowing and intelligent in light of the circumstances of each case. *Johnson v. Zerbst*, 304 U.S. 458, 468-69 (1938); *Adams v. United States*, 317 U.S. 269 (1942).

While *Johnson* and *Adams* involved the right to jury trial in criminal cases, this Court's opinion in *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 187 (1972), a civil case, applied the same standards the Court set forth in its criminal decisions. *See Erie Telecommunications, Inc. v. City of Erie,* 853 F.2d 1084, 1095 (3d Cir. 1988).

The Courts of Appeals have held that contractual waiver of the right to trial by jury by one who has not yet suffered harm must be knowing, intelligent and voluntary. *See, Hulsey v. West,* 966 F.2d 579, 581 (10th Cir. 1992); *Leasing Serv. Corp. v. Crane,* 804 F.2d 828, 832 (4th Cir. 1986); *K.M.C. Co, Inc. v. Irving Trust Co,* 757 F.2d 752, 755-56 (6th Cir. 1985).

State courts have also recognized this right. *See, e.g., Broemer v. Abortion Services of Phoenix*, 840 P.2d 1013, 1017 (Ariz. 1992)(contractual agreement between a patient and doctor to submit malpractice claims to arbitration was unenforceable where "there was no conspicuous or explicit waiver of the right to a jury trial or any evidence that such rights were knowingly, voluntarily and intelligently waived."); *Moore v. Fragatos*, 321 N.W.2d 781 (Mich. App. 1982)(invalidating medical malpractice arbitration agreement, and holding that civil parties are entitled to the same degree of protection regarding waiver of jury trial as criminal defendants).

In the class action context, the jury right is protected by affording absent class members, whose claims for money damages would be entitled to a jury trial "an opportunity to remove himself from the class by executing an 'opt out' or 'request for exclusion' form to the court." *Phillips Petroleum v. Shutts*, 472 U.S. 797, 811 (1985). *Cf. Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), *cert. dism. as improvidently granted*, 511 U.S. 117 (1994)(where Brown had no opportunity to opt out of class action, "there would be a violation of minimal due process if Brown's damage claims were held barred by *res judicata*.").

The lower court manifestly abridged this right by certifying under Rule 23(b)(1) a class that was so constructed as to make notice, waiver or the opportunity to opt-out a practical impossibility.

C. The Class Action Settlement Violates State Constitutional Rights in Violation of the Rules Enabling Act.

Congress' mandate in the Rules Enabling Act that the rules of procedure "shall not abridge, enlarge or modify any substantive right" is not limited to federal rights.

The causes of action affected by the class action and settlement in this case arise under state law. Members of the class who develop asbestos disease would ordinarily bring their tort actions in state court, unless those actions are filed in or removed to federal court on the basis of diversity of citizenship. There they would have been entitled to the rights guaranteed by their state constitutions.

Foremost among these guarantees is the right to trial by jury, independently guaranteed by nearly every state constitution. Paul B. Weiss, *Reforming Tort Reform: Is There Substance to the Seventh Amendment?*, 38 Catholic U. L. Rev. 737, 739 n.11 (1989)(citing 48 state constitutional provisions). Indeed many state constitutions guarantee this right in even more emphatic terms than the Seventh Amendment. *See, e.g.*, Wash. Const., Art I, § 21: "The right of trial by jury shall remain inviolate . . ."

These state constitutional guarantees afford important substantive rights. For example, state courts have struck down legislation substituting a statutory cap on damages for the jury's assessment as violative of the state right to a jury trial. *E.g., Moore v. Mobile Infirmary*, 592 So. 2d 156 (Ala. 1991); *Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla. 1987); *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 771 P.2d 711 (Wash. 1989); *cf., Sorrell v. Thevenir*, 69 Ohio St. 3d 415; 633 N.E.2d 504 (1994)(statute mandating

reduction of jury award by amount of "collateral benefits" violates state right to trial by jury).

Additionally, 37 state constitutions contain a guarantee of a "right to a remedy" or "open courts" which have no cognate provision in the federal constitution. *See generally*, Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U.L. Rev. 579, 615 n.218 (1981) (citing statutes). Typical of such guarantees is a provision in the Alabama Constitution:

> That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay.

Ala. Const., Art. I, §13.

Courts have struck down, as violative of such open court provisions, state product liability "statutes of repose" which purport to extinguish a common law cause of action for personal injury caused by an unreasonably dangerous product a fixed number of years following the sale of the product, even if the injury or disease has not yet become manifest or the plaintiff could not reasonably have discovered the injury or disease. *See, e.g., Kennedy v. Cumberland Engineering Co.*, 471 A.2d 195 (R.I. 1984); *Daugaard v. Baltic Co-op Bldg Supply Ass'n*, 349 N.W.2d 419 (S.D. 1984); *Berry v. Beech Aircraft Corp.*, 717 P.2d 670 (Utah 1985).

These are but two of the substantive rights that members of the class would enjoy in pursuing their state law claims and by the lower court in violation of the Rules Enabling Act.

III. THE BACK-END OPT-OUT DOES NOT PRESERVE THE RIGHT TO TRIAL BY JURY.

A. The Settlement Penalizes the Choice of Jury Trial

The Fifth Circuit and Respondents assert that the settlement's provision for a "back-end opt-out" preserves the

class members' "ultimate right to resort to the tort system." 90 F.3d at 973. ATLA suggests that Judge Smith, dissenting below, is closer to the mark in characterizing the provision as "window dressing." 90 F.3d at 1006 (Smith, J., dissenting). It does not preserve the right to trial by jury. Indeed, it raises constitutional problems of its own.

The settlement plan imposes a number of burdens and penalties on class members who exercise their constitutional rights to a jury trial. The claimant may not file a tort suit until he or she has endured a series of administrative petitions, mediation and arbitration. A plaintiff who prevails at trial may recover no more than $500,000 in compensatory damages. App. 607a. Those who choose mediation or arbitration face no predetermined limit. Moreover, judgments for tort plaintiffs are to be paid in installments, spread out over 5 to 10 years, without interest. Those who choose mediation or arbitration of their claims are paid in three years. See App. 605a-606a.

This explicit discrimination against the exercise of a fundamental right expressly guaranteed by the constitution plainly violates the equal protection clause of the Fourteenth Amendment. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 33 & 38-39 (1973). As ATLA explains in Part IV, B, infra, the plan does not represent the means least burdensome to constitutionally protected interests. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 263 (1974).

B. The Cap On Damages Violates the Seventh Amendment.

The most egregious deficiency of the back-end opt-out is the ceiling on damages. Claimants can recover no more than $500,000 in compensatory damages, regardless of the amount of damages established by the evidence and assessed by the jury. Although this limitation was characterized by Respondent Class as "relatively inconsequential" Brief in Opposition of Respondent Class Representatives Gerald

Ahearn, et al. at 12 & 14, Judge Smith more accurately states that "[s]uch a severe limitation on a party's ability to prove and try damages deprives him of an essential element of a jury trial." 90 F.3d at 1006 (Smith, J., dissenting).

A number of state legislatures have imposed limits on recoverable damages in certain tort cases. One federal court, after careful review of the Seventh Amendment guarantee, concluded that Virginia's $750,000 cap on damages in medical malpractice cases violated the right to trial by jury. *Boyd v. Bulala*, 647 F. Supp. 781 (W.D. Va. 1986), on reconsideration, 672 F. Supp. 915 (W.D. Va. 1987), *aff'd in part, rev'd in part*, 877 F.2d 1191 (4th Cir. 1989):

> [S]ection 8.01-581.15 would require the court to ignore a verdict in an amount above the cap which is supported by evidence and instead enter judgment for the cap amount. This extraordinary requirement bears no relation to the doctrines of remittitur, new trial, and judgment notwithstanding the verdict, and it cannot be founded upon the court's inherent power over verdicts and judgments. Indeed, there exists no permissible basis for entering a judgment predetermined by the legislature in place of a judgment on a verdict properly reached by a jury.

647 F. Supp. at 789. On reconsideration, District Judge Michael reaffirmed his conclusion, stating that:

> To be meaningful, the [Seventh] amendment must protect the ability of the jury to make a difference in the outcome of the trial. Clearly, the determination of damages is one of the principal ways by which the jury affects the result of a case.

672 F. Supp. at 921.

The Fourth Circuit, reversing in part, held that the damage cap did not violate the Seventh Amendment. The court based this conclusion, in part, on *Tull v. United States*, 481 U.S. 412 (1987), which the appellate court read as suggesting that the right to a jury trial "may not even extend to the remedy phrase of a civil trial." 877 F.2d at 1196 n.5.

This Court recently made clear that *Tull* held no such thing. *Feltner v. Columbia Pictures Television*, ___ U.S. ___, 118 S. Ct. 1279, 1287-88 (1998). To the contrary "[t]he right to a jury trial includes the right to have a jury determine the amount of statutory damages, if any, awarded to the copyright owner." *Id.* at 1287. Historically, where the Seventh Amendment applies, it is for the jury to determine the amount of damages. *Id. See also Bank of Hamilton v. Lessee of Dudley*, 2 Pet. 492, 525 7 L.Ed. 496 (1829)(Seventh Amendment requires that the value of compensation for improvements to real property, in a common law action, be determined by a jury.).

Also vindicating District Judge Michael's analysis is this Court's decision in *Hetzel v. Prince William County*, ___ U.S. ___, 118 S. Ct. 1210 (1998). In that per curiam decision, this Court confirmed that a federal judge's authority to order a remittitur where an award is not supported by the evidence, is limited by the Seventh Amendment requirement that the nonmoving party be afforded the option of a new trial so that "both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).[5]

A substantial number of state supreme courts have held that legislative limits on the amount of damages that may be awarded in tort cases -- even where they apply only to noneconomic damages -- violate state constitutional guarantees to the right to trial by jury. *E.g.*, *Moore v. Mobile Infirmary*, 592 So. 2d 156 (Ala. 1991); *Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla. 1987); *Sofie v.*

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[5] Indeed, the Virginia Supreme Court has recently ruled that additur violates its constitutional right to trial by jury, relying heavily on *Dimick Supinger v. Stakes*, ___ Va. ___, 495 S.E.2d 813 (1998). In addition, the court has granted review in a case that urges the court to revisit the issue of whether the damage cap violates the state constitution. *Pulliam v. Coastal Emergency Services*, No. 980659, rev. granted June 11, 1998.

Fibreboard Corp. , 112 Wash. 2d 636, 771 P.2d 711 (Wash. 1989).[6]

It is clear, ATLA submits, that the back-end opt-out provided by the settlement does not preserve the Seventh Amendment right to trial by jury and does not bring the lower court's action into compliance with the Rules Enabling Act.

IV. THE CONSTITUTIONAL RIGHTS OF FUTURE VICTIMS CAN BE PRESERVED WITHOUT DESTROYING THE CLASS ACTION SETTLEMENT.

A. The Seventh Amendment May Not Be Sacrificed In the Pursuit Of Administrative Efficiency.

The court below and the Respondents herein expend a great deal of ink and energy defending the proposed settlement as the last best hope for rescuing asbestos victims from a tort system that has not served them well. The lower court praised the TDP as more efficient and less expensive than the tort remedies is seeks to replace. 90 F.3d at 985.

It is true that the growing number of civil actions by persons suffering asbestos-related disease presents "an important challenge to the civil justice system." Deborah R.

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[6] Other state supreme courts have held that such damage caps in tort cases violate a variety of other state constitutional provisions. *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 689 N.E.2d 1057 (1997)(damage cap violates separation of powers provision and prohibition of special legislation); *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251 (Kan. 1988)(violates right to jury trial and right to remedy), *overruled in part Bair v. Peck*, 811 P.2d 1176 (Kan. 1991); *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (N.H. 1978)(violates state equal protection guarantee); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978) (violates equal protection); *Morris v. Savoy*, 61 Ohio St 3d 684, 576 N.E.2d 765 (Ohio 1991)(violates due process); *Reynolds v. Porter*, 760 P.2d 816 (Okla. 1988)(violates equal protection); *Knowles v. United States*, 544 N.W.2d 183 (S.D. 1996)(violates due process); *Lucas v. United States*, 757 S.W.2d 686 (Tex. 1988)(violates open courts guarantee); *Condemarin v. University Hosp.*, 775 P.2d 348 (Utah 1989)(violates due process).

Hensler, Asbestos Litigation In the United States: A Brief Overview (RAND Institute For Civil Justice 1992). However, it must also be recognized that this situation has been imposed on our courts by a long and egregious pattern of wrongdoing by the asbestos industry. Ronald L. Motley, Susan Nial, *A Critical Analysis of the Brickman Administrative Proposal: Who Declared War on Asbestos Victims' Rights?*, 13 Cardozo L. Rev. 1919 (1992)(detailing the "sordid history" of the asbestos industry's deliberate exposure of American workers to asbestos and its cover-up of the tragic consequences); *Borel v. Fibreboard Corp.*, 493 F.2d 1076, 1084-86, 1092-94 (5th Cir. 1973)(reviewing evidence that defendants ignored known dangers of asbestos and failed to warn workers). In their efforts to meet this challenge, courts must not inflict a second injury on asbestos victims by eliminating their constitutional rights.

Administrative efficiency, though laudable, does not trump the Seventh Amendment. The *Granfinanciera* Court emphasized this point:

> It may be that providing jury trials in some fraudulent conveyance actions . . . would impede the swift resolution of bankruptcy proceedings and increase the expense of Chapter 11 reorganizations. But 'these considerations are insufficient to overcome the clear command of the Seventh Amendment.'

492 U.S. at 63, quoting *Curtis v. Loether*, 415 U.S. at 198.

As then-Justice once observed:

> [N]o amount of argument that the device provides for more efficiency or more accuracy or is fairer will save it if the degree of invasion of the jury's province is greater than allowed in 1791. To rule otherwise would effectively permit judicial repeal of the Seventh Amendment . . .
>
> The guarantees of the Seventh Amendment will prove burdensome in some instances; the civil jury was surely a burden to the English governors who, in its stead, substituted the vice-admiralty court. But, as with other

> provisions of the Bill of Rights, the onerous nature of the protection is no license for contracting the right secured by the Amendment.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 346 (1979) (Rehnquist, C.J., dissenting).

B. The Constitutional Rights Of Future Victims Can Be Preserved By Permitting Victims of Asbestos Disease To Opt Out At The Time When Injury Becomes Manifest.

As a practical matter, the notion that this Court must choose between the benefits promised by the settlement plan so laboriously negotiated by Respondents and the constitutional rights of individual asbestos victims is a false choice. As noted earlier, ATLA does not oppose the use of class actions to meet the challenge of mass tort litigation, provided that the right to trial by jury is preserved for each and every claimant as demanded by the Seventh Amendment. ATLA submits that the settlement plan in this case could have been crafted to preserve Seventh Amendment rights.

The settlement's insistence that the class members' tort causes of action be extinguished immediately -- even for those who will not develop asbestos disease until some future date -- resurrects an old injustice. Under rigid statutes of limitations or statutes of "repose," a person's cause of action in tort could become time-barred even before any harm occurred or became manifest. The unfairness of the harsh rule was forcefully portrayed by Judge Jerome Frank:

> Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a nonexistent railroad. For substantially similar reasons, it has always heretofore been accepted as a sort of logical axiom that a statute of limitations does not begin to run against a cause of action before that cause of action exists.

Dincher v. Marlin Firearms Co., 198 F.2d 821, 823 (2d Cir. 1952). Nearly every jurisdiction has replaced this harsh result with a "discovery rule," under which the time limit does not begin to run until the person knows or should have known of his or her injury. *See, e.g., Urie v. Thompson*, 337 U.S. 163 (1949). This rule applies with particular force in state product liability actions involving product-related diseases that become manifest only after a long latency period. A leading treatise opines: "The fairness and justice of the [discovery] rule is evident. It would be a travesty of justice if a plaintiff were to lose a meritorious cause of action where he had no way of knowing that an injury or illness was product related." 2A Louis R. Frumer and Melvin I. Friedman, PRODUCTS LIABILITY §12.02[3] at 12-28 (1991).

There is no inherent reason why this state law discovery rule could not have been incorporated into the settlement plan. Specifically, the settlement could provide that members of the exposure-only class have an opportunity at the time they develop an asbestos-related disease or injury to opt out of the class and pursue a civil action in tort. The claimant would be required to exercise this option before the expiration of the applicable state statute of limitations, generally a period of years starting from when the claimant knew or should have known of his or her asbestos-related injury. In other words, the asbestos victim would retain the right to opt out of the settlement and file suit within the same time restrictions that would have controlled in the absence of the settlement. Any tort action would be governed by state law, not subject to the restrictions imposed by the settlement plan and not limited to $500,000.

ATLA suggests that preserving claimants' jury rights would not impose an unreasonable burden on Fibreboard, its insurers, or on the settlement class. It is true that permitting jury trials to coexist with the settlement plan introduces some uncertainty in the process. However, the plan was willing to tolerate the uncertainty of tort trials, albeit in a burdensome and restrictive fashion. The fact is that the vast majority of

asbestos cases -- well over 99% -- end in settlement. Hensler, *supra,* at 9; *In re Joint E. & S. Dists. Asbestos Litigation,* 129 B.R. 710, 747 (E. & S.D.N.Y. 1991). If the TDP in fact provides a fair and efficient alternative, there is no reason to anticipate a significant increase in jury trials.

Nor would the removal of the damage limitations be fatal to the settlement plan. Respondents concede that the limits are "relatively inconsequential" because judgments against Fibreboard in excess of $500,000 have been "exceedingly rare." Brief in Opposition of Respondent Class Representatives Gerald Ahearn, at 13 n.6.

Indeed, such a provision would benefit the entire class. Aware that asbestos victims can "vote with their feet," administrators of the TDP have a strong incentive to make certain that it is a fast, fair and efficient alternative to a tort trial.

Finally, a delayed opt-out would go a long way toward eliminating the difficult constitutional problems that troubled this Court in *Amchem*: The impossibility of giving meaningful notice to persons who have no symptoms of asbestos disease and the problem of whether such persons have a sufficient injury in fact to present a case or controversy for purposes of federal jurisdiction under Article III. 117 S. Ct. at 2252 & 2244 n.15.

These advantages have persuaded a number of commentators to recommend the use of a delayed opt-out as a means of preserving the rights of future claimants. *See* Brian Wolfman and Alan B. Morrison, *Representing The Unrepresented In Class Actions Seeking Monetary Relief,* 71 N.Y.U. L. Rev. 439, 478 (1996); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action,* 95 Colum. L. Rev. 1343, 1448-49 (1995); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective,* 80 Cornell L. Rev. 941, 964-68 (1995). Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions,"* 80 Cornell L. Rev. 811, 836 (1995).

At least one court has approved a class action settlement that included just such a delayed opt-out for class members who may suffer injury in the future. In *Bowling v. Pfizer, Inc.,* 143 F.R.D. 141 (S.D. Ohio 1992), *appeal dism.* 995 F.2d 1066 (6th Cir. 1993), a class action by patients who received defective artificial heart valves, the settlement agreement expressly provides that class members whose heart valves fracture in the future may opt to reject guaranteed compensation and sue for damages at that time. *Id.* at 150.

Addressing the challenge of asbestos litigation does not require courts to sacrifice the constitutional right to trial by jury.

CONCLUSION

For these reasons, amicus respectfully urges this Court to reverse the decision below.

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OCTOBER TERM, 1998

ESTEBAN ORTIZ, *et al.*,

Petitioners,

v.

FIBREBOARD CORPORATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF EXXON CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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CONSENT OF THE PARTIES

Petitioners and respondents have consented to the filing of this brief. Their letters of consent are being filed separately herewith.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae Exxon Corporation ("Exxon") is a leading oil and gas company with facilities and operations throughout the United States and the world. Exxon is a defendant in *In re EXXON VALDEZ*, No. A89-0095-CV (D. Alaska), consolidated litigation arising from the 1989 grounding of the tanker EXXON VALDEZ in Prince William Sound, Alaska. The litigation is one of the largest cases in this country's history, involving five compensatory damages classes, multiple subclasses, and thousands of direct action claimants. During the more than nine years of proceedings, the district court has entered over 350 pre-trial and post-trial orders, and the Ninth Circuit Court of Appeals has decided or has pending before it more than a dozen appeals.

During the *VALDEZ* litigation, Exxon requested and the district court certified a "mandatory" (*i.e.*, non-opt-out) punitive damages class under Federal Rule of Civil Procedure 23(b)(1)(B).[2] This certification made possible a single trial of all punitive damages claims arising from the

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* Exxon Corporation made any monetary contribution to its preparation or submission.

[2] *In re EXXON VALDEZ*, *supra*, Order No. 204 (D. Alaska Apr. 15, 1994). The Ninth Circuit denied a mandamus petition by certain plaintiffs challenging the certification, *Chugach Alaska Corp. v. United States Dist. Ct.*, No. 94-70174 (9th Cir. Apr. 28, 1994), and dismissed an interlocutory appeal for lack of appellate jurisdiction. *Chugach Alaska Corp. v. Exxon Corp.*, 26 F.3d 130 (9th Cir. 1994) (Table); *see Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

EXXON VALDEZ grounding and avoided the prospect of multiple punitive damages trials in federal and state courts by thousands of claimants alleging the same misconduct in connection with the same maritime accident.[3] The consolidation of punitive damages claims into a unitary, non-opt-out class is a landmark in the sensible and efficient use of class certification procedures under Rule 23(b)(1)(B), in a manner entirely consistent with the due process rights of class members.[4]

Petitioners in this case and the *amici* trial lawyer organizations that support them ask this Court to endorse the sweeping proposition that due process considerations mandate an absolute prohibition against certification under Rule 23(b)(1)(B) of any mandatory class alleging *in personam* claims for money damages. In Exxon's view, petitioners and their supporting *amici* seriously misread existing law and this Court's prior decisions -- especially *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) -- and propose an overbroad principle that wrongly precludes

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[3] The trial of the punitive damages class claims against Exxon resulted in a jury award of $5 billion on which the district court, after settlement of all remaining claims for compensatory damages, entered judgment. Exxon's appeal from that judgment is presently pending before the Ninth Circuit Court of Appeals. No party in the Ninth Circuit now challenges the mandatory class certification order.

[4] To be sure, Rule 23(b)(1)(B) certification of a mandatory punitive damages class is no constitutional panacea. Notwithstanding the benefits and protections it affords, the rule alone cannot guarantee that the amount of any punitive damages award is constitutionally permissible. In such cases, the district and appellate courts still must conduct substantive reviews of punitive damages awards to ensure that they are "reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991).

legitimate and beneficial uses of mandatory class actions. Exxon accordingly urges this Court to decline petitioners' invitation to issue an absolute prohibition against mandatory limited fund class actions and to issue instead a pronouncement no broader than necessary to decide the factual issues that this case presents.

SUMMARY OF ARGUMENT

1. The law has long approved mandatory joinder of competing *in personam* monetary claims against a "limited fund." Federal Rule of Civil Procedure 23(b)(1)(B) recognizes this principle. It expressly authorizes certification of a mandatory class where the adjudication of separate suits by individual claimants would risk foreclosing or substantially impairing the interests of other claimants, as is so where numerous litigants seek recovery from a fund that may not be sufficient to satisfy all claims. Federal courts have invoked this provision to certify mandatory classes in mass tort and other multiple litigant cases where individual adjudication of the compensatory damages claims of initial claimants would risk depleting a defendant's assets before later claimants could be compensated. In the punitive damages context, courts have extended this principle to cases in which early claims would likely exhaust the constitutional limit on punitive damages awardable against a defendant for a single course of conduct, thus addressing also the vexing problem of seriatim, excessive multiple punishment. In both situations, the mandatory class procedure enables the equitable disposition of competing claims against a "limited fund," or *res*, much akin to interpleader actions, limitation of liability suits in admiralty and analogous equitable proceedings.

2. *Shutts* does not hold that such certification is unconstitutional. The due process issue in *Shutts* was purely

jurisdictional: whether a state could constitutionally bind class members not otherwise subject to personal jurisdiction within the state. The *Shutts* reasoning has no applicability in situations where a district court exercises jurisdiction over a *res*, thereby acquiring exclusive, equitable jurisdiction over all *in personam* claims against the *res*. The *Shutts* reasoning likewise does not apply in cases where class members all have minimum contacts with the forum state (as was indisputably so in the EXXON VALDEZ case), where they have expressly or impliedly waived any jurisdictional objection, where they are subject to nationwide service of process or a long-arm statute of the forum state, or where they are otherwise subject to the forum court's jurisdiction. Finally, *Shutts* did not speak at all to situations involving competing claims against a limited fund -- either in the punitive damages context or otherwise. The Court expressly declined to address the due process requirements for binding absent class members in class actions seeking "equitable relief," and recognized that the case before it did not involve a limited fund. *Id.* at 811 n.3, 820.

3. Given a proper reading of *Shutts*, Exxon does not believe there is any due process ground on which to preclude certification of the mandatory class in this case. But whether the Court agrees or disagrees, Exxon respectfully urges it to avoid issuing any opinion casting doubt on the propriety of mandatory classes in limited fund cases involving punitive damages claims. Such cases differ fundamentally from Rule 23(b)(1)(B) class actions involving competing compensatory damage claims against a limited fund and therefore should be considered separately. In contrast to compensatory damages claims, which involve competing "private interests," punitive damages claims concern only "collective," "public interests." *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353, 1358 (11th Cir. 1996).

Certification of a mandatory punitive damages class thus implicates none of the concerns that, under the due process balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), May weigh in favor of the imposition of an additional procedural safeguard.

ARGUMENT

I. RULE 23(b)(1)(B) CERTIFICATION SERVES IMPORTANT AND LEGITIMATE PURPOSES IN CASES INVOLVING *IN PERSONAM* MONETARY CLAIMS AGAINST A LIMITED FUND.

Petitioners and their supporting *amici* agree that Federal Rule of Civil Procedure 23(b)(1)(B) permits certification of a non-opt-out class in appropriate cases involving competing claims against a "limited fund," but nevertheless argue that a "limited fund" exists only in constructive trust and analogous cases in which the fund is fixed and identified. However, neither the historical underpinnings of Rule 23 nor the bulk of recent cases interpreting it will support that conclusion. Rather, they make clear that certification under Rule 23(b)(1)(B) also may be appropriate where the resources available to satisfy competing claims against a defendant are limited, and there is a *risk* that those funds will be insufficient to satisfy all claims.

A. The Equitable Underpinnings Of Limited Fund Class Actions.

The modern-day mandatory class action has its roots in the seventeenth century English "bill of peace," a mandatory joinder device used in the chancery courts to bind entire classes of similarly situated claimants. *See* Zechariah Chafee, *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297 (1932). Courts in this country have recognized

mandatory class actions at least since *Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1853), a case in which representatives of a plaintiff class of ministers sued to vindicate rights in a common fund. This Court upheld the suit on the ground that, in cases involving a "common interest or a common right," "[a] court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court." *Id.* at 302-03.

In the ensuing 140 years, this Court has consistently recognized the binding effect of these traditional class action judgments, provided that absent class members were adequately represented. *See, e.g., Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662 (1915); *Hartford Life Ins. Co. v. Barber*, 245 U.S. 146 (1917); *Sovereign Camp of the Woodmen of the World v. Bolin*, 305 U.S. 66 (1938); *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921), *overruled in part on other grounds, Toucey v. New York Life Ins. Co.*, 314 U.S. 118 (1941). In *Hansberry v. Lee*, 311 U.S. 32 (1940), the Court acknowledged that a "class" or "representative" suit was a "recognized exception" to the general rule that an *in personam* judgment can have no binding effect on persons not parties to the proceeding. *Id.* at 40; *see also Richards v. Jefferson Cty.*, 517 U.S. 793, 798-99 (1996); *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989) (both reaffirming *Hansberry*).

None of these cases recognized or even suggested that due process required the right to opt out of a traditional class action. *See* Herbert B. Newberg & Alba Conte, 1 *Newberg on Class Actions* §§ 1.09, 1.21 (1992) (describing "limited fund and other no opt-out class actions" recognized under former Equity Rule 38 (adopted in 1912)). Rather, as set forth in *Hansberry*, the critical precondition for binding

absent class members in this type of class action was adequacy of representation. 311 U.S. at 42-43. While other cases generally suggest that due process also requires reasonable notice of the proceeding and the opportunity to object or participate,[5] none suggests a general due process right to opt out where the requisites of a traditional equitable class action are present.

The modern "opt-out" class action is of much more recent vintage, having as its precursor the so-called "spurious" class action first recognized in Rule 23 of the original Federal Rules of Civil Procedure adopted in 1938. This was essentially a permissive joinder device, designed as a vehicle to facilitate simultaneous adjudication of actions at law involving common issues, binding only to the extent that absent class members affirmatively opted *into* the class. *See Newberg on Class Actions, supra*, § 1.09. The 1966 amendments, which introduced the current federal rules, retained this device under Rule 23(b)(3), but substituted an opt-out procedure for the opt-in procedure provided in the 1938 rules.

Significantly, both the 1938 rules and the 1966 amendments also retained the traditional equitable non-opt-out class actions recognized at common law. The modern versions of these procedures are contained in Rules 23(b)(1) and (b)(2). As discussed in the next section, the traditional limited fund class action is specifically encompassed in Rule 23(b)(1)(B), the provision on which the district court below relied and under which the district court in Alaska certified the mandatory punitive damages class in *EXXON VALDEZ*.

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[5] *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

B. Modern Cases Under Rule 23(b)(1)(B).

Rule 23(b)(1)(B) expressly authorizes the certification of a mandatory (*i.e.*, non-opt-out) class where:

> The prosecution of separate actions . . . would create a risk of . . . adjudications with respect to the individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

Fed. R. Civ. P. 23(b)(1)(B).

This subsection "takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter." *Advisory Committee's Note to Proposed Amendments to Rule 23*, 39 F.R.D. 69, 100-01 (1966). The Advisory Committee contemplated specifically that this rule would apply in cases involving competing claims against a "limited fund":

> In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. *This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims.* A class action by . . . representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem.

Id. at 101 (emphasis added).

As noted above, courts have applied the rule in a variety of contexts, including mass tort actions where the record establishes a substantial risk that individual actions by early claimants would so deplete the defendant's resources as to prejudice recoveries by later claimants. *See, e.g., In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 739 (1992), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993); *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992); *In re Granada Partnership Sec. Litig.*, 803 F. Supp. 1236, 1244 (S.D. Tex. 1992); *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1407, 1418 (E.D.N.Y. 1989), *aff'd*, 907 F.2d 1295 (2d Cir. 1990); *In re Jackson Lockdown/MCO Cases*, 107 F.R.D. 703, 712-13 (E.D. Mich. 1985); *Coburn v. 4-R Corp.*, 77 F.R.D. 43, 45-46 (E.D. Ky. 1977).[6]

In such cases, certification of mandatory "limited fund" classes under Rule 23(b)(1)(B) prevents the "unseemly race to the court room door with monetary prizes for a few winners and worthless judgments for the rest." *Coburn*, 77 F.R.D. at 45. As the court of appeals below recognized, "[l]imited-fund class actions effect a pro-rata reduction of all claims in order to treat all claimants fairly. Thus, they sound in equity even though the relief they provide necessarily affects the amount of money damages the claimants can ultimately receive." *In re Asbestos Litig.*, 90 F.3d 963, 986 (5th Cir. 1996). The procedure closely resembles actions for interpleader, for limitation of liability

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[6] Other courts, while holding open the possibility of such certification on a proper showing, have denied certification under Rule 23(b)(1)(B) on the ground that the record did not establish the requisite limited fund. *E.g., In re Bendectin Prod. Liab. Litig.*, 749 F.2d 300, 305-06 (6th Cir. 1984); *Jenkins v. Raymark Indus. Inc.*, 109 F.R.D. 269, 276-77 (E.D. Tex. 1985), *aff'd*, 782 F.2d 468 (5th Cir. 1986).

in admiralty, and on the filing of a final account of a trustee or executor, as to which it is well established that absent parties may be bound without any right to opt out. *Id.* at 987; *In re Joint E. & S. Dist. Asbestos Litig. (Findley)*, 878 F. Supp. 473, 478 (E. & S.D.N.Y. 1995), *aff'd in part and vacated in part on other grounds*, 78 F.3d 764 (2d Cir. 1996); 1 *Newberg on Class Actions*, *supra*, § 20.14; *cf. Mullane*, 339 U.S. at 311-13.

As also noted above, courts have extended this principle to situations where punitive damages are sought by multiple claimants for a single tort and there is a risk that the first tried claims would exhaust the legal limit on the aggregate amount of punitive damages awardable. The rationale was well articulated by Judge Weinstein, who certified such a class in the *In re "Agent Orange"* tort litigation:

> There must be . . . some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction . . . . At the very least, a trial court passing on future claims may admit evidence as to the payment of prior awards which may be used by a jury to reduce an award to a party seeking additional punishment for the same conduct . . . . There is, therefore, a substantial probability that "adjudication with respect to individual members of the class . . . would as a practical matter be dispositive of the interests of the other members not parties to the adjudication." Accordingly, a class of all [claimants] . . . [is] certified under [Rule 23](b)(1)(B) . . . for the award of punitive damages.

In re "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 728 (E.D.N.Y. 1983) (quoting Fed. R. Civ. P. 23(b)(1)(B)), *mandamus denied sub nom. In re Diamond Shamrock Chem. Co.*, 725 F.2d 858 (1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987).

This Court, of course, has recently issued a series of decisions confirming that due process indeed limits the amount of permissible punitive damages. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562-63, 569 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991).

Mandatory class treatment of punitive damages claims is therefore appropriate in cases like *EXXON VALDEZ* where huge numbers of claimants separately demand punitive damages for the same allegedly wrongful conduct. Mandatory certification in such cases not only protects against the inequitable distribution of potential punitive damages among similarly situated claimants, but it also protects the interests of the defendant and of society as a whole in avoiding multiple punishments for the same conduct. The latter concern has vexed courts, while eluding any solution, since the early days of mass torts. *See, e.g., Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839-42 (2d Cir. 1967) (Friendly, J.) (warning of danger of punitive damages "overkill" in mass tort cases); *Dunn v. HOVIC*, 1 F.3d 1371, 1385-91, *modified on reh'g*, 13 F.3d 58 (3d Cir. 1993) (discussing concerns expressed about repetitive punitive awards in asbestos cases); *In re School Asbestos Litig.*, 789 F.2d 996, 1004 (3d Cir. 1986) ("powerful arguments have been made that, as a matter of constitutional law or of substantive tort law, the courts shoulder some responsibility for preventing repeated awards of punitive damages for the same acts or series of acts").

II. NEITHER *SHUTTS* NOR ANY OTHER DECISION OF THIS COURT REQUIRES AN ABSOLUTE OPT-OUT RIGHT IN CLASS ACTIONS INVOLVING *IN PERSONAM* MONETARY CLAIMS AGAINST A LIMITED FUND.

Petitioners' claim that due process requires an absolute right to opt out in any class action involving wholly or predominantly *in personam* claims for money damages finds no support in this Court's prior cases. Petitioners read far too much into *Shutts*, which concerns not the right to opt out generally, but only the requirements for adjudicating *in personam* claims of individual litigants over whom a forum state has no independent basis for asserting personal jurisdiction.[7] The *Shutts* reasoning plainly has no

[7] It bears note, moreover, that the *Shutts* opinion discusses jurisdictional constraints in the context of *state* court class actions only. Federal courts often have broader jurisdictional reach than the courts of the states in which they sit, as when Congress has enacted statutes authorizing nationwide service of process. *See United States v. Union Pac. R.R. Co.*, 98 U.S. (8 Otto) 569, 603-04 (1878) ("nothing in the Constitution ... forbids Congress to enact that ... any [district court] ... shall, by process served anywhere in the United States, have the power to bring before it all the parties necessary to its decision"); *e.g.*, 28 U.S.C. § 2361; *Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974) (court's jurisdiction over federal securities claims extends to all persons having minimum contacts with the United States). Likewise, in cases involving pre-trial transfers under 28 U.S.C. § 1407, the federal multidistrict litigation statute, courts have held that a transferee court may constitutionally exercise jurisdiction, for pre-trial purposes including settlement, over all persons having minimum contacts with a transferor forum. *See In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1434-35 (2d Cir. 1993); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 163 (2d Cir. 1987); *but see Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992) (applying *Shutts* where mandatory settlement class was certified by § 1407 transferee court; no discussion of possible jurisdiction based on class member's minimum contacts with transferor forum), *cert. dismissed*, 511 U.S. 117 (1994).

applicability in cases where a federal court exercises jurisdiction over a *res*, thereby acquiring exclusive, equitable jurisdiction over all *in personam* claims against the *res*.[8]

In analogous proceedings, the existence of a federal maritime court's exclusive jurisdiction over a "limited fund" and, consequently, over all *in personam* claims against that fund is long recognized. In a limitation of liability suit in admiralty, where the claims against a vessel and its owner arising from a maritime tort may exceed the value of the vessel and its freight, the court acquires jurisdiction exclusive of all other courts "to marshall all claims, whether of strictly admiralty origin or not, and to give effect to them by the apportionment of the *res*." *Just v. Chambers*, 312 U.S. 383, 386 (1941); *Hartford Accident & Indem. Co. v. Southern Pac. Co.*, 273 U.S. 207, 215 (1927). The court's jurisdiction in such situations to apportion a *res* accordingly has been held to extend to "cases of personal injury and death . . . [and to] tort claims even when the tort is non-maritime." *Just*, 312 U.S. at 386.[9]

[8] To the extent petitioners and their supporting *amici* assert that an *in personam* claim which "merely seeks a money decree . . . cannot be a '*res*,'" they are "mistaken." *Brooklyn Trust Co. v. Kelby*, 134 F.2d 105, 116 (2d Cir.) ("no matter how inadequate '*res*' may be as a descriptive label, it is not true that a money claim '*in personam*' cannot be a '*res*'"), *cert. denied*, 319 U.S. 767 (1943). Nor is actual "possession" a prerequisite to the court's continuing and exclusive jurisdiction over the *res*. *See Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 85-88 (1992).

[9] *See also Hartford*, 273 U.S. at 217 (limitation "looks to a complete and just disposition of a many-cornered controversy, and is applicable to proceedings in rem against the ship, as well as to proceedings *in personam* against the owner"); *Guillot v. Cenac Towing Co.*, 366 F.2d 898, 906 (5th Cir. 1966) (jurisdiction extends to claims against shipowner's insurer where there is a real risk that separate suits may exhaust the shipowner's coverage).

The *Shutts* reasoning likewise does not apply in cases where class members have minimum contacts with the forum state ,[10] (as was indisputably so in the *EXXON VALDEZ* case) where the class members have expressly or impliedly waived any jurisdictional objection,[11] where they are subject to nationwide service of process (such as in statutory interpleader suits) or to a long-arm statute of the forum state,[12] or where they are otherwise subject to the forum court's jurisdiction.[13]

It bears emphasis, moreover, that the Court in *Shutts* expressly declined to extend its jurisdictional holding to class actions seeking "equitable relief," 472 U.S. at 811 n.3,[14] and the case concededly did not involve a limited fund. *See id.* at 820 ("there is no specific identifiable *res* in Kansas, nor is

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[10] *See Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1560 n.8 (3d Cir. 1994).

[11] *See DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1175-76 (8th Cir. 1995); *White v. National Football League*, 41 F.3d 402, 407-08 (8th Cir. 1994); *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d at 292.

[12] *See supra* note 7.

[13] *See, e.g., In re Joint E. & S. Dist. Asbestos Litig.*, 78 F.3d 764, 777-78 (2d Cir. 1996) (*quasi in rem* jurisdiction over claims of beneficiaries of a trust created in the forum state).

[14] *See* 1 *Newberg on Class Actions*, *supra*, § 1.21; *cf. Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994) ("In a Rule 23(b)(2) class action for equitable relief, the due process rights of absent class members generally are satisfied by adequate representation alone").

there any limited amount which may be depleted before every plaintiff is compensated").[15] More recent cases, analogizing limited fund class actions under Rule 23(b)(1)(B) to their equitable antecedents, have concluded that *Shutts* does not mandate an absolute opt-out right.[16]

III. THIS IS NOT AN APPROPRIATE CASE IN WHICH TO CONSIDER THE PROPRIETY OF RULE 23(b)(1)(B) CERTIFICATION OF A MANDATORY PUNITIVE DAMAGES CLASS.

Given a proper reading of *Shutts*, Exxon does not believe there is any constitutional basis on which to preclude certification under Rule 23(b)(1)(B) of the mandatory class in this case. As already discussed, *Shutts* did not consider the right to opt out generally or in the context of Rule 23(b)(1)(B). Whether the Court agrees or disagrees, however, Exxon respectfully urges it to avoid issuing any opinion that could cast doubt on the viability of mandatory classes in limited fund cases involving multiple litigants claiming punitive damages arising from a single course of conduct. Such cases differ fundamentally from mandatory class actions involving claims for compensatory damages

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[15] The same is true of *Brown*, the other principal case on which petitioners rely. *See* 982 F.2d at 389 & n.2 (applying *Shutts* in non-limited fund case certified under Rules 23(b)(1)(A) and 23(b)(2), but *not* 23(b)(1)(B)).

[16] *See In re Orthopedic Bone Screw Prod. Liab. Litig.*, 176 F.R.D. 158, 180-81 (E.D. Pa. 1997); *In re Jackson Lockdown/MCO Cases*, 107 F.R.D. at 714; *see also* 1 *Newberg on Class Actions*, *supra*, § 1.18 ("actions by or against similarly situated persons to allocate pro rata an available fund that is insufficient to pay all claims, such as those . . . under Rule 23(b)(1)(B), are equitable in nature, though they involve money claims individually. . . . Accordingly, *Shutts* jurisdictional standards generally do not apply. . . .").

from a limited fund and therefore should be considered separately.

As this Court has often stated, due process "is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). It, "unlike some legal rules, is not a technical conception with fixed content unrelated to time, place and circumstances," *id.*, but instead involves a weighing of interests, both public and private, *id.*, the purpose of which is to ensure "fundamental fairness." *Walters v. National Assoc. of Radiation Survivors*, 473 U.S. 305, 320 (1985). The key question is whether there is a risk to a private interest that is serious enough, in light of competing public and private interests, to warrant an additional procedural safeguard. *Walters*, 473 U.S. at 320-21; *Mathews*, 424 U.S. at 341-48.

In this case, petitioners argue that mandatory class certification violates due process rights because it precludes class members from separately prosecuting their claims before and to the exclusion of competing class members. In the context of *compensatory* damages, this argument is weak: certification of a mandatory limited fund class under Rule 23(b)(1)(B) "impairs" the private interests of individual litigants only to the extent necessary to prevent the disproportionate impairment of identical private interests of other similarly situated, equally deserving claimants. Thus, any "cost" to individual claimants resulting from the certification of a mandatory class would be precisely balanced or outweighed by the "costs" to later claimants -- making a persuasive case *against* any absolute opt-out right. *Mathews*, 424 U.S. at 348; *see also Walters*, 473 U.S. at 320-21 ("we have emphasized that the marginal gains from affording an additional procedural safeguard often may be

outweighed by the societal cost of providing such a safeguard").

But petitioners' arguments move from weak to nonexistent when they are applied to *punitive* damages claims. Such claims affect no "private interests" at all -- and thus present no risk of the deprivation of a private interest that, under *Mathews*, may be weighed in the due process calculus. Punitive damages vindicate not private interests, but the quintessentially sovereign right of the "public" to punish and deter misconduct. They are "fundamentally collective," *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1333 (5th Cir. 1995), and "are awarded for the public benefit -- the collective good." *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353, 1358 (11th Cir. 1996). "[T]he state and not the victim is considered the true party plaintiff." *Id.* A punitive damage claim is therefore never a *private* claim; rather, a plaintiff who seeks punitive damages acts, by definition, as a "private attorney general" to protect a "public interest." For this reason, a state has been held to have the power to eliminate punitive damages claims altogether. *In re Paris Air Crash*, 622 F.2d 1315, 1319-20 (9th Cir. 1980) (Kennedy, J.). As the *Paris* court said:

> [T]he wrongful death statute allows full compensation for loss of companionship and financial support. Plaintiffs seek in addition . . . the opportunity to act as private attorneys general to effect the deterrence and retribution functions of [the state's punitive damage law]. *So far is this right from being a fundamental personal right that it is an interest not truly personal in nature. It is rather a public interest* . . . .

Id. (emphasis added); *see also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981) ("Punitive damages by definition are not intended to compensate the

injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct").

Accordingly, even if petitioners were correct -- which they are not -- that as a matter of constitutional due process the private interests of a few claimants in recovering compensatory damages could override the interests of society and of other claimants in the equitable apportionment of a limited fund, such considerations could have no force in the case of *punitive* damages, which are imposed for public, not private, reasons. The Court therefore should ensure that its decision in this case does not inadvertently affect the situation, quite different from the one present here, of a mandatory punitive damages class, where the "limited fund" is not the defendant's assets, but rather the constitutional limit on the amount of punitive damages that may be imposed. *BMW*, 517 U.S. at 562-63, 569; *Oberg*, 512 U.S. at 420.[17]

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[17] The remaining reasons that petitioners and their supporting *amici* give for uniformly precluding Rule 23(b)(1)(B) certification in limited fund cases are equally deficient in the context of a mandatory punitive damages class. The bankruptcy laws plainly cannot justify any prohibition where the fund against which there are competing claims is limited not by the defendant's assets, but rather by due process (in the case of punitive damages claims) or by some other legal limitation. Nor is the Seventh Amendment any constitutional barrier to mandatory class certification where, as occurred in the *EXXON VALDEZ* litigation, the class members claim's are actually tried to a jury, or where the right to jury trial is preserved but the claims are settled before trial.

CONCLUSION

For all the reasons stated above, *amicus curiae* Exxon Corporation respectfully urges the Court to affirm the judgment below. At a minimum, the Court should make clear that due process does not preclude certification under Federal Rule of Civil Procedure 23(b)(1)(B) of mandatory punitive damages classes such as the class certified in the *EXXON VALDEZ* litigation.

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In The

Supreme Court of the United States

October Term, 1997

ESTEBAN ORTIZ, *et al.*,

Petitioners,

v.

FIBREBOARD CORPORATION, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICUS CURIAE ASBESTOS VICTIMS OF AMERICA IN SUPPORT OF RESPONDENTS

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TEXT

Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 2-3 (Mar. 1991) 7

INTEREST OF AMICUS CURIAE[1]

The Asbestos Victims of America ("AVA") submits this brief in support of the Respondents who in the court below obtained affirmance of the District Court's order approving the settlement among the class of asbestos victims, Fibreboard and its insurers. AVA's interest in this action is to preserve the compensation that, without the settlement, might not have otherwise been available.

AVA was founded in 1981 by asbestos victims and friends to provide a clearinghouse for information on asbestos disease and available medical, social, and legal services. A nonprofit educational organization, AVA has grown to an alliance of more than 20,500 victims, survivors, union members, scientists, medical and legal professionals, and concerned individuals.

AVA is dedicated to increasing awareness of the national asbestos tragedy and its effects upon present and future generations, and to helping victims and their families to obtain financial justice for their injuries and deaths. As part of this effort, AVA is committed, to the extent its resources permit, to taking all available steps to ensure that developing law provides fair and adequate compensation to persons who develop or die from asbestos-related diseases.

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[1] Letters of consent to the filing of this brief have been filed with the Clerk. No counsel for any party authored the brief in whole or in part, and no person or entity other than counsel for *amicus curiae* made any monetary contribution to its preparation or submission.

In this connection, AVA filed an *amicus curiae* brief in this Court to oppose the class-action settlement in *Amchem Products, Inc. v. Windsor*, 117 S.Ct. 2231 (1997), as unfair to class members in the denial of any compensation to significant claims and in the failure of class counsel to adequately represent the entire Class.

In the instant case, however, AVA supports the class settlement because it ensures fair and adequate compensation for asbestos victims in a manner that balances the victims' ability to control their own claims and the need to secure resources that might not otherwise have been available.

Therefore AVA files this *amicus* brief to urge affirmance of the Court of Appeals' approval of this settlement.

SUMMARY OF ARGUMENT

The Respondents are addressing in detail the legal challenges raised by Petitioners to the settlement now before this Court. AVA wishes to emphasize (1) the all-or-nothing situation in which Fibreboard's insurance was at risk in 1993, (2) the compelling interests that tens of thousands of victims of asbestos diseases have in seeing this settlement approved, and (3) the readily-apparent differences between this settlement and the settlement this Court rejected in *Amchem*.

From the victims' perspective, the settlement's benefits are enormous and its costs are few. Without the settlement, Fibreboard's insurance coverage might have

been lost on appeal and asbestos victims might never have received any compensation for their injuries caused by exposure to Fibreboard products containing asbestos. This Court therefore should not allow the abstract theoretical issues voiced by Petitioners to obscure the real interest of all parties, including asbestos victims, in the settlement's approval.

ARGUMENT

AVA supports this settlement because, when it was promulgated, it represented the only certain method for meeting the needs of asbestos victims in light of the possible alternative—the loss of Fibreboard's insurance coverage.

AVA therefore urges that the debate over the application of Rule 23 to this settlement take into account the overriding interests of the victims of asbestos diseases. These asbestos victims are hurting—physically, financially, and emotionally. They lack compensation for their medical expenses and lost wages. In many instances their life-expectancy has been significantly shortened by their disease. Their interests lie in a quick and sure path to fair compensation for all victims, present and future.

Moreover, when the settlement is viewed as a response to the unique and serious need for an alternative to an all-or-nothing judicial ruling on insurance coverage, it will be seen that the central requirements for a class action settlement are met. The class representatives could "fairly and adequately protect the interests of the class," Rule 23(a)(4), because of the common interest of

all class members in obtaining the recovery rather than losing the insurance coverage, and in balancing of the interests of currently injured and future claimants. Moreover, this class action settlement also meets the requirement of Rule 23(b)(1)(B) for a non-opt-out class action.

For these reasons, elaborated below, the decision of the Court of Appeals should be affirmed.

A. The question common to all class members was avoidance of the risk of loss of Fibreboard's insurance.

This settlement was prompted by one common question affecting all class members—whether all class members would accept the terms of this settlement or lose the insurance proceeds that might otherwise have evaporated in an adverse coverage ruling between Fibreboard and its insurers.

By responding to this common question, this class action settlement does not manifest any intra-class conflict that might violate Rule 23(a)(4) and satisfies the requirements of Rule 23(b)(1)(B).

The salient facts supporting the foregoing conclusions were recited in the Court of Appeals' first opinion. *In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996).

By 1988 Fibreboard's insurance coverage from insurers other than Pacific and Continental was largely exhausted, leaving Fibreboard unable to pay further judgments, settlements, or defense costs. *Id.* at 969.

By 1993, Fibreboard's insurance coverage from Pacific and Continental was very much in doubt. Continental refused to provide coverage, and that issue was being vigorously litigated in California and elsewhere. *Id.* at 969-970.

To preserve its continued viability, Fibreboard was forced to negotiate settlements in the form of contingent assignments to asbestos victims of Fibreboard's claims against Continental. Yet the validity of these settlements was at issue in the *Andrus* case in California and in Fibreboard's suit in the Eastern District of Texas. *Id.* at 969-970.

On the appeal of the California trial court's decision that all policies from inhalation to manifestation were triggered, both Fibreboard and its insurers stood a substantial risk of losing the appeal. *Id.* at 974. If the insurers lost the coverage case, then without a settlement they would face "staggering liability." *Id.* at 971. If the insurers won the coverage case, then without a settlement Fibreboard would require immediate bankruptcy protection from $1.2 billion of settlement obligations outstanding by the end of 1992, *id.* at 970-971, and the members of this settlement class would recover virtually nothing. Without a settlement, Fibreboard could also have lost Continental's coverage if the assignment settlements were ruled to be breaches of Fibreboard's agreements with Continental. *Id.* at 969, 974. These considerations, intensified by the pendency of oral argument on August 27, 1993, prompted the parties to negotiate for a global settlement.

In such a settlement, however, Continental required "total peace," *i.e.*, protection from any additional liability for claims against Fibreboard, including claims that would be brought in the future. Under California law Continental could not obtain "total peace" unless persons already harmed by Fibreboard's asbestos products were represented. *Shapiro v. Republic Ins.*, 52 Cal.2d 437, 341 P.2d 289 (1959). *Shapiro* held that in a suit between the insurer and the insured the judgment granting reformation and finding no coverage was not binding on a claimant against the insured, where the claimant "had suffered the injuries" but was not a party to the coverage action.

Under *Shapiro*, exposure-only victims could argue that they had a right to be represented in any settlement of Fibreboard's liability because, as the trial court had already held in Fibreboard's insurance coverage action, the term "injuries" (at least in an insurance policy) included the subclinical scarring of lung tissue that, upon inhalation of asbestos fibers, begins the disease process. *See Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.*, 45 Cal.App.4th 1, 37-48, 52 Cal.Rptr. 690 (1996).

Therefore, to obtain "total peace" Continental was compelled to reach agreement with a class that represented all persons who might ever develop an injury from Fibreboard's asbestos. Thus, this class action, brought by representatives of all persons who had been exposed to Fibreboard's asbestos but had not yet sued, was essential to facilitate the settlement.

It would be ironic—and tragic—if this class action settlement were to be held invalid because the extent of

the class, as required by state law, were deemed to violate the requirements of Rule 23. Because the insurers could not obtain "total peace" unless future claims were included in the settlement, this global asbestos settlement necessarily included both currently injured claimants and future claimants in the same class. Hence, the joinder of these diverse interests in this single class was not a vice that violates Rule 23, but was an unavoidable requirement grounded in the 40-year latency of asbestos diseases[2], a medical fact that Rule 23 should accommodate.

In other contexts courts have applied traditional legal concepts to fit the unique medical facts of asbestos diseases in a manner that balances the needs of plaintiffs, the needs of defendants, and sound judicial administration.

For example, following a decision of this Court,[3] courts commence the personal injury statute of limitations in asbestos cases, not with inhalation of fibers or commencement of the disease or even medical detection of symptoms, but rather with the plaintiff's knowledge or reason to know of the asbestos disease. *E.g., Velasquez v. Fibreboard Paper Products Corp.*, 97 Cal.App.3d 881, 885, 159 Cal.Rptr. 113 (1979).

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[2] Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 2-3 (Mar. 1991).

[3] *Urie v. Thompson*, 337 U.S. 163 (1949) (the statute of limitations for silicosis commences upon manifestation, regardless of the earlier undetected commencement of the disease).

Another judicial recognition of the unique realities of asbestos injuries occurs with respect to causation. Normally a plaintiff must prove that the defendant caused the plaintiff's injury. However, because the plaintiff cannot prove that a particular defendant's asbestos fibers *"actually contribut[ed]* to . . . the plaintiff's or decedent's" disease, courts allow asbestos plaintiffs to prove only that the defendant's asbestos products made a substantial "contribution to the plaintiff or decedent's *risk* or *probability* of developing" asbestos disease. *E.g., Rutherford v. Owens-Illinois, Inc.*, 16 Cal.4th 953, 977, 67 Cal.Rptr. 16 (1997) (emphasis in original).

Again, because asbestos victims can develop more than one disease at different times, many courts have recognized that the usual rule against splitting a claim into two separate suits cannot be mechanically applied. Instead courts do not allow one asbestos disease to commence the statute of limitations (and thus bar recovery) for a subsequent, different, and often more lethal asbestos disease.[4]

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[4] *E.g., Marinari v. Asbestos Corp., Ltd.*, 612 A.2d 1021, 1022 (Pa.Super. 1992); *Potts v. Celotex Corp.*, 796 S.W.2d 678, 680-85 (Tenn. 1990); *Fusaro v. Porter-Hayden Co.*, 548 N.Y.S.2d 856, 860 (N.Y.Sup. 1989); *Mauro v. Raymark Industries, Inc.*, 561 A.2d 257 (N.J. 1989); *Hagerty v. L & L Marine Services, Inc.*, 788 F.2d 315, 320 (5th Cir. 1986); *Devlin v. Johns-Manville Corp.*, 495 A.2d 495, 502 (N.J.Super.L. 1985); *Eagle-Picher Industries, Inc. v. Cox*, 481 So.2d 517, 522 (Fla.App. 1985); *Sheppard v. A.C. and S. Co.*, 498 A.2d 1126, 1129-1134 (Del. 1985); *Smith v. Bethlehem Steel Corp.*, 492 A.2d 1286 (Md. 1985); *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506, 521 (5th Cir. 1984); *Pierce v. Johns-Manville Sales Corp.*, 464 A.2d 1020, 1025 (Md. 1983); *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111 (5th Cir. 1982).

Under the foregoing authorities—harmonizing existing rules of law with the medical realities of asbestos diseases—the consolidation here of currently injured and future claimants into one class must be regarded, not as an impediment to a class action settlement under Rule 23, but as a necessity, especially because both groups had a common and urgent interest in securing insurance proceeds through a class action settlement and because no showing can be made that the interests of one group have been materially sacrificed to the interests of the other.

In sum, to avoid the all-or-nothing consequences created by the insurance coverage litigation, the parties agreed to this class action settlement, creating a $1.535 billion trust necessarily for the benefit of the class of all asbestos victims who had not yet sued Fibreboard.

B. The settlement provides substantial benefits to all class members.

For many reasons, the settlement before the Court is far preferable for all class members to the disaster to the class lurking in the possibility of a loss on appeal of Fibreboard's insurance coverage. In particular, the trust's dispute-resolution mechanisms provide a structure that maximizes fairness to both currently injured and future asbestos victims while minimizing the compromise of their rights. For example:

- More of the settlement proceeds go to the claimants because transaction costs are reduced and attorneys' fees are limited to 25%.

- Claimants have a series of settlement opportunities—with the trust, in mediation, in arbitration, or with the District Judge or his designee—while preserving the right to trial by jury.
- Claimants can recover any amount that the claim merits, up to $500,000 per claim, while giving up only damages above this amount and punitive damages. No claim valid under state law is barred.
- The assets of the trust are protected for later claimants by spendthrift provisions that limit the amount of assets paid out in any given year, and if payments are limited during a particular year, the sickest claimants are paid first. *In re Asbestos Litigation, supra,* 90 F.3d at 973.

These provisions are as generous and as fair to all class members as possible under the circumstances.

C. This settlement does not suffer the infirmities of the *Amchem* settlement.

The settlement should be affirmed because it does not suffer the infirmities that this Court found, or that AVA objected to, in *Amchem.*

First, in *Amchem* the settlement failed to pass muster under Rule 23(b)(3) because the only common questions underlying the settlement were the claimants' asbestos exposure and interest in settling rather than bringing suit. *Id.* at 2249. In the instant case, however, class certification rests on the provisions of Rule 23(b)(1)(B), and a common

question "identical to interests held by all members of the class" does exist—whether all claimants could obtain access to insurance proceeds or risk receiving no compensation at all. 90 F.3d at 976.

Second, although the *Amchem* settlement's structure created a conflict between present and future claimants, preventing adequate representation by the named parties, Rule 23(a)(4), no such conflict has materialized in the instant case.

- Unlike *Amchem,* where the class members did not face an all-or-nothing threat to compensation, the members of this class were unified by their common interest in avoiding the total loss of Fibreboard's insurance.
- Unlike *Amchem,* which made no adjustment for inflation (harming future claimants to benefit present claimants), this settlement contains protections for future claimants that are fair and reasonable on their face but imposes no significant restriction on recovery by currently injured claimants.[5]
- Unlike the limited opt-out provisions in *Amchem,* here any claimant who believes his or her claims are not being fairly compensated may sue.

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[5] Minor restrictions, which apply equally to all class members, include (1) limiting recovery to $500,000 (not a very significant limitation inasmuch as only a dozen civil recoveries against Fibreboard have exceeded that amount); (2) no recovery of punitive damages; and (3) no allowance of pre- and post-judgment interest.

- Unlike *Amchem*, here class members were represented by a guardian ad litem.
- Unlike *Amchem*, here expert testimony established that the compromises accepted by the class did not sacrifice the interests of present claimants at the expense of future claimants or vice-versa.
- This Global Settlement Agreement was found to be fair and reasonable, a finding not challenged on appeal. *Id.* at 976-982.

For these reasons, the intra-class conflict that this Court found in *Amchem* is not manifest in the settlement before this Court and cannot be shown to have materially diminished the rights of currently-injured claimants at the expense of future claimants or vice-versa.

AVA urges affirmance for the additional reason that the vices that AVA objected to in the *Amchem* settlement are absent in the instant case.

- In *Amchem* certain cognizable state law claims received no compensation whatsoever. Here all claims cognizable under state law are compensable.
- In *Amchem* the defendants retained control of the funds, creating an incentive to undervalue claims. Here the trust will be administered by neutral trustees.
- In *Amchem* compensation values were significantly less than historical CCR settlement values. Here the trust or a jury will value each claim on its merits.

- In *Amchem* compensation values were fixed, without adjustment for inflation, thus harming future claimants. Here no fixed compensation amounts are set, and the trust or jury may take inflation into account.
- In *Amchem* the asbestos defendants determined whether the claim qualified for compensation and the claimants's right to sue was severely restricted. Here the independent trustees must consider all cognizable claims, and all claimants may sue.
- In *Amchem* defendants offered class counsel settlements of inventory claims greater than the class would receive under the settlement, and medical criteria were imposed on future claimants only. Here no such inconsistent treatment exists between the class and other clients of class counsel[6] or between currently injured and future claimants.

For these reasons AVA urges approval of the settlement as lacking the conflicts and other flaws that beset the *Amchem* settlement.

The alternative to approving this settlement—the Trilateral Settlement—is vastly inferior for asbestos victims for two reasons.

- Under the Trilateral Settlement Fibreboard will spend much of the limited settlement proceeds to litigate

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[6] District Court Findings of Fact, ¶¶ 329-331, CA 407a-408a.

claims in the tort system, thereby shifting hundreds of millions of dollars away from compensation and creating a risk of no compensation for future claimants.[7]

- Under the Trilateral Settlement asbestos victims will likely pay 33% to 40% of their recoveries in attorneys' fees rather than the 25% maximum set by the class settlement, and other costs will combine with attorneys' fees to consume up to 63% of all monies.[8]

These factors will cause asbestos victims to receive several hundred million dollars less under the Trilateral Settlement than under the Class settlement.[9]

In sum, AVA—like the representative plaintiffs, Class counsel, the guardian ad litem, the District Court and the Court of Appeals—has no hesitation in supporting this settlement because the compromises accepted by the Class were eminently reasonable in light of the compelling need to resolve Fibreboard's insurance disputes on terms favorable to all Class members and the settlement's relatively minor limitations on recovery.

In an ideal world it is conceivable that the Class might have received more than $1.535 billion through the tort system. But this is not an ideal world. At the time of the settlements, no one could know what the final resolution of the coverage case would be. If Fibreboard had lost

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[7] *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505, 529 (E.D. Tex. 1995).

[8] *Id.* at 530.

[9] *Ahearn, supra*, 162 F.R.D. at 529.

its insurance claims, it would have become bankrupt and Class members would have received *nothing* because Fibreboard's net worth was far outstripped by the $1.2 billion that Fibreboard already owed its present asbestos victims. Because of Fibreboard's relatively small size compared to its much greater asbestos-related tort liabilities, all Class members had a pressing interest in avoiding an adverse outcome of Fibreboard's insurance dispute.

AVA therefore urges this Court to focus on the real financial interests of the victims rather than on the theoretical issues argued by Petitioners. Such focus demonstrates that the benefits of this settlement to Class members vastly outweigh the limitations on individual recoveries accepted as the price of obtaining the settlement and sharing the settlement proceeds fairly and equitably over time among all Class members entitled to share in it.

AVA regards the resolution of Class members' claims by a victim-oriented trust—using a wide range of commonly-accepted ADR procedures before resort to litigation in the tort system thus reducing transaction costs and maximizing funds available to pay Class member claims—as a positive benefit of this settlement.

Another very substantial benefit is the limitation on attorneys' fees to a maximum of 25%, increasing Class members' net recovery by 10-25%.

Petitioners and their supporting *amici curiae* would jeopardize the rights of Fibreboard's asbestos victims because they fear that an affirmance by this Court might some day be read to disadvantage some possible future

victim of a future mass toxic tort. To avoid this most theoretical of potential risks, they ask the Court to ignore—and possibly destroy—the very rights and interests of the tens of thousands of real existing and future asbestos victims whose compensation from Fibreboard will be assured if the settlement is approved.

This Court should not embrace theoretical fears about the misapplication of law in other cases at the expense of justice in this case. AVA speaks for the real interests of asbestos victims in the affirmance of this settlement. This settlement created a trust amply funded with over $1.5 billion that indisputably constituted a fair settlement of the insurance dispute that could have had catastrophic consequences for all members of the class. If this settlement is not approved, compensation for all of Fibreboard's asbestos victims will be reduced by significantly increased attorney fees, litigation expenses, and costs of defense, increasing the likelihood that future claimants against Fibreboard will obtain no recovery.

CONCLUSION

For all the foregoing reasons, Rule 23, construed under Rule 1 to encourage the "just, speedy, and inexpensive determination of every action," poses no obstacle to the class settlement. The decision of the Court of Appeals should therefore be affirmed.

Respectfully submitted,

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Petitioners,

vs.

FIBREBOARD CORPORATION, *et al.*,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS (NASCAT) IN SUPPORT OF RESPONDENTS

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS (NASCAT) IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE[1]

The National Association of Commercial Law Attorneys (NASCAT) is an association of law firms and attorneys who litigate cases involving antitrust, commercial, consumer, employee and retiree benefit, environmental, and securities fraud claims in federal and state courts. NASCAT's members frequently represent victims of corporate abuse, schemes to defraud, defective products, and anti-competitive conduct. In civil actions challenging such wrongdoing, NASCAT's members not only seek compensation for victims, but also attempt to deter wrongdoers, modify corporate behavior, and improve victims' access to justice.

In literally thousands of cases filed over the past 30 years, NASCAT's members have represented plaintiffs in class actions brought under Federal Rule of Civil Procedure 23, or its state law equivalents, including innumerable cases settled or tried to verdict. In each of those cases, NASCAT's members and their clients (the proposed class representatives) have sought to satisfy the adequate representation requirement of Rule 23(a)(4). Several of those cases have involved classes certified

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[1] Letters of consent to the filing of this *amicus* brief received from Petitioners' and Respondents' counsel have been filed with this Court. Pursuant to Supreme Court Rule 37.6, NASCAT certifies that no counsel for any party authored this brief in whole or in part and no person or entity other than *amicus curiae* made any monetary contribution to its preparation or submission.

under subdivision (b)(1)(B) of Rule 23, including *In re Drexel Burnham Lambert Group*, 960 F.2d 285 (2d Cir. 1992), in which the Second Circuit affirmed Judge Pollack's certification of claims brought by securities claimants against Drexel, a bankrupt securities brokerage firm, and affirmed the trial court's approval of a $350 million settlement. *Drexel* and other decisions issued by the lower federal courts since Rule 23 was amended in 1966 demonstrate that subdivision (b)(1)(B) must be applied flexibly, not restrictively, in accordance with the particular facts and circumstances of each individual case and that, if the trial court properly considers the evidence proffered by the parties and makes requisite findings of fact and conclusions of law in certifying the class under this provision, its judgment should be affirmed on appeal.

As a result of its members' collective experience, NASCAT believes and advocates in this *amicus curiae* brief that the district court properly certified the class under Rule 23(a)(1)-(4) and (b)(1)(B) and properly approved the Global Settlement Agreement in this case.[2]

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[2] The district court's Memorandum Opinion certifying the class and approving the settlement is reported as *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505 (E.D. Tex. 1995), and is reproduced as Appendix E to the Petition for Writ of Certiorari (Volume I) (the "Petition"), CA 183a-242a. The district court's Findings of Fact are reported as *Ahearn v. Fibreboard Corp.*, Civil Action No. 6:93cv526, 1995 U.S. Dist. LEXIS 11532 (E.D. Tex. July 27, 1995), and are reproduced as Appendix F to the Petition (Volume II), CA 243a-468a. The district court's Conclusions of Law are reported as *Ahearn v. Fibreboard Corp.*, 1995 U.S. Dist. LEXIS 11523 (E.D. Tex. July 27, 1995), and are reproduced as Appendix G to the Petition (Volume III), CA 469a-511a. The district court's Supplemental Conclusions of Law are reported as *Ahearn v. Fibreboard Corp.*, 1995 U.S. Dist. LEXIS 11531 (E.D. Tex. July 27, 1995), and are reproduced as Appendix H to the Petition (Volume III), CA 512a-518a.

NASCAT also believes and advocates below that the Fifth Circuit properly affirmed the district court's entry of judgment. For the reasons that will be advanced, NASCAT files this *amicus curiae* brief in support of Respondents and respectfully submits that the decision of the court below should be affirmed.

INTRODUCTION AND SUMMARY OF ARGUMENT[3]

The district court and the Fifth Circuit correctly found that the proposed class representatives satisfied the prerequisites of Rule 23(a)(1)-(4), including the "adequacy of representation" requirement. The courts below correctly rejected arguments concerning purported "intraclass conflicts" posited by Petitioners and their *amici*, which amounted to potential, hypothetical, or theoretical conflicts that the federal courts have uniformly found not to defeat class certification.

The district court properly certified the class under Rule 23(b)(1)(B), finding that plaintiffs and class members shared a common "significant risk" of losing Fibreboard's insurance coverage if piecemeal litigation was allowed to proceed, and the Fifth Circuit properly affirmed that finding. As an *alternative* holding – one that this Court need

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[3] Page references to the briefs filed by Petitioners and their *amici* are stated as "Pet. Brief. at ___" (Brief for Petitioners), "Law Professors Brief at ___" (Brief of Legal Ethics, Civil Procedure, and Constitutional Law Scholars as *Amici Curiae* in Support of Petitioners), and "Trial Lawyers Brief at ___" (Brief of *Amicus Curiae* Trial Lawyers For Public Justice, P.C., In Support Of Petitioners).

not reach – the district court properly certified the class under subdivision (b)(1)(B) by finding that a "limited fund" existed; the Fifth Circuit correctly affirmed that alternative holding.

ARGUMENT

I. THE COURTS BELOW PROPERLY FOUND THAT THE PROPOSED CLASS MET THE PREREQUISITES OF RULE 23(a) AND THAT THE INTERESTS OF THE CLASS REPRESENTATIVES AND THE MEMBERS OF THE CLASS ARE NOT ANTAGONISTIC

A. The Rulings Of The Courts Below

A class may be certified if all four prerequisites of Rule 23(a) are met and one or more of the provisions of Rule 23(b) is satisfied. *See Amchem Products, Inc. v. Windsor*, ___ U.S. ___, 117 S. Ct. 2231, 2245 (1997); 5 James W. Moore, *Moore's Federal Practice* ¶23.20, at 23-55 (2d ed. 1998) ("5 J. Moore"); 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 2d* § 1759, at 97 (1986) ("7A Wright, Miller & Kane"). In this case, the district court found that the four prerequisites of Rule 23(a) – numerosity, commonality, typicality, and adequacy of representation – were met. *See* CA 223a-230a (162 F.R.D. at 523-26); CA 478a-484a (Conclusions of Law, ¶¶12-24); CA 513a-514a (Supplemental Conclusions of Law, ¶¶2-5). In the original appeal, the intervenors did not dispute the district court's finding of numerosity, but they argued that the class met none of the other Rule 23(a) prerequisites; the Fifth Circuit, however, rejected these contentions. CA 54a-72a (90 F.3d at 974-82); *see also* CA 2a-3a (134 F.3d at 670) ("We detailed

in our prior opinion our agreement with the thorough study and conclusions by the district court, satisfying the requirements of class certification under Rule 23(a).").

Petitioners and their *amici* now focus their attack upon Rule 23(a)(4)'s "adequacy-of-representation" requirement, seeking to persuade this Court that even a potential, hypothetical, or theoretical "conflict" between class members *per se* renders the class representatives inadequate. *See* Pet. Brief at 18-22; Law Professors' Brief at 9-12. Their arguments were raised in the courts below, were thoroughly analyzed by the district court and the Fifth Circuit, and were properly rejected.

B. Potential, Theoretical, Or Hypothetical Intra-class "Conflicts" Do Not Prevent Class Certification Under Rule 23(a)(4)

A class action may be certified by the district court only if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement ensures that the class be "adequately represented both by counsel and by the named representative plaintiffs." *Linney v. Cellular Alaska Partnership*, No 97-16637, 1998 U.S. App. LEXIS 20484, at *7 (9th Cir. Aug. 21, 1998) (citations omitted). "Adequate representation" depends on the qualifications of counsel for the class representatives, " 'an absence of antagonism, a sharing of interests between representatives and absentees [class members], and the unlikelihood that the suit is collusive.' " *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 390 (9th Cir. 1992) (citation omitted); *see also General Tel. Co. v. Falcon*, 457 U.S. 147, 159-60 n.13 (1982) ("adequacy-of-representation" requirement focuses on "conflicts of interest"). *See generally* 7A Wright, Miller & Kane,

§ 1768, at 326-66 (elucidating what constitute "antagonistic" or "conflicting" interests between class representatives and class members); 5 J. Moore, ¶23.25[4][b][i], at 23-118 (same).

In this case, after conducting an eight-day evidentiary hearing and properly taking the proposed settlement into account, *see Amchem*, 117 S. Ct. at 2248-49, the district court found that "[t]he Class representatives have . . . adequately represented the Class," CA 228a (162 F.R.D. at 525), rejecting the intervenors' arguments that there was a "conflict" between them and class members because they were united by a common interest in resolving Fibreboard's insurance coverage dispute:

> The Court concludes that the Class representatives have a sufficient stake in the outcome and that the interests of the Class representatives and the members of the class are not antagonistic. The Class representatives span the range of the various medical categories under the Trust Distribution Process and include both already-impaired and not-yet-impaired claimants. The class representatives and the members of the class – all of whom are equally at risk in the coverage litigation – are united in seeking the maximum possible recovery for their asbestos-related claims.
>
> The class representatives adequately represent those Class members whose injuries have not yet become manifest. The Complaint is expressly brought on behalf of unimpaired Class members; and unimpaired Class members have interests in the global settlement common with each of the Class representatives and are united with them in eliminating the risk of the coverage litigation by seeking the maximum possible settlement for the entire Class.

CA 482a-483a (Conclusions of Law, ¶¶22-23); *see also* CA 382a-386a (Findings of Fact, ¶¶279-88) (determining adequacy of Global Health Claimant Class Representatives). The district court found – and the Fifth Circuit agreed – that the class representatives and class members had an overriding common interest in achieving an immediate, class-wide resolution to the insurance coverage dispute. CA 361a-362a (Findings of Fact, ¶232); CA 98a (90 F.3d at 993). *See* 7A Wright, Miller & Kane, § 1768, at 359 ("potential conflict" between class representatives and members "should not preclude the use of the class action device if the parties appear united in interest against an outsider").

The extensive factual record in this case, including the testimony of 18 witnesses and the hundreds of documents introduced and considered by Jude Parker at the eight-day fairness hearing, reinforces the conclusion that the district court exercised its sound discretion in finding that the class representatives adequately represented the interests of already-impaired and not-yet-impaired claimants. The district court carefully considered, and properly rejected, the intervenors' contention that purported "intraclass conflicts" between class members – no matter how artificial or arbitrary – require the creation of subclasses.

Taken to their logical extreme, the arguments advanced by Petitioners and their *amici* would mean that any time an objector's lawyer could point to any type of potential, hypothetical, or theoretical "conflict" between class members, subclasses would have to be created and separate negotiating counsel appointed for each supposedly conflicting group (or sub-group). From

NASCAT's collective experience, which involves representing plaintiffs in thousands of class actions, the result likely would be chaos and many putative class actions never would be certified, let alone settled. Gratefully, the federal courts by and large have rejected the notion advanced by Petitioners and have properly exercised their sound discretion and refused to allow purely "potential" conflicts to derail class certification.[4]

Petitioners and their *amici* ignore the fact that the district court expressly considered the alleged "intraclass conflicts" they previously raised,[5] with Judge Parker

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[4] Thus, in a recent opinion, the Third Circuit affirmed the district court's finding that plaintiffs satisfied Rule 23(a)(4)'s adequacy of representation requirement:

> We believe the district court exercised its sound discretion when it found . . . the named plaintiffs adequately represent the class. . . .
>
> [T]he crux of this class action is the allegation that Prudential engaged in a scheme to defraud policyholders by means of company-wide deceptive sales practices. The named parties, like the members of the class, would need to establish this scheme in order to succeed on any of the claims in the Second Amended Consolidated Complaint. Even those class members with "other" claims share the common task of demonstrating the existence and implementation of this scheme. Consequently, we believe the proposed class satisfies the adequacy of representation requirement of Rule 23(a).

In re Prudential Ins. Co. of America Sales Practices Litig. Agent Actions, 148 F.3d 915, 1998 U.S. App. LEXIS 17057, at *87-88 (3d Cir. July 23, 1998).

[5] According to the district court, the Ortiz Intervenors contended that "intraclass conflicts" exist between each of the following pairings of groups of Global Health Claimant Class members: (1) class members who were first exposed to asbestos-containing products prior to March 15, 1959, and those who were first exposed after that date; (2) class members who have already suffered a "cognizable" asbestos-related injury and those who have not yet suffered such an injury; and (3) class members who will be individually represented in filing their claims against the Trust by plaintiffs' counsel and those who will not. CA 413a-414a (Findings of Fact, ¶343).

stating that the intervenors' expert witness "acknowledged at the fairness hearing that separate subclasses consisting of these various groups are not required, but he asserted that separate counsel should have been appointed to negotiate on behalf of the various interests of" class members. CA 414a (Findings of Fact, ¶343). As Judge Parker further stated:

> [T]he Court finds that Professor Leubsdorf's testimony on these points lacks credibility. *Professor Leubsdorf expressed the view that distinctions, often arbitrarily chosen, create conflicts that prevent ethical representation of a class even where the common interests shared by the class members vastly outweigh the distinctions among them, and the settlement fairly accommodates all interests.* The Court takes judicial notice that, were this view to be correct, numerous settlements reflecting far more blatant distinctions among intraclass groups would necessarily have been the product of unethical conduct.

CA 414a (Findings of Fact, ¶344) (emphasis added). The Fifth Circuit agreed, noting that "[t]he record amply supports [the district court's] findings." CA 62a (90 F.3d at 978).

The experience of NASCAT members in securities fraud cases demonstrates that creative lawyers whose intent is to oppose class certification or derail a potential settlement always can dream up supposed "conflicts"; however, the courts usually (and properly) find that these

supposed intraclass "conflicts" are far outweighed by the *common* interests of class members. *See Blackie v. Barrack*, 524 F.2d 891, 908-10 (9th Cir. 1975) (securities fraud class action; rejecting notion that conflict existed between those class members who sold corporation's stock during class period and those who retained it).[6] If Petitioners were correct and the sort of hypothetical "conflicts" between class members that they posit preclude an adequacy-of-representation finding under Rule 23(a)(4), then defrauded shareholders never could represent bondholders in securities class actions, *cf. In re American Continental Corp./Lincoln Savings & Loan Securities Litigation*, 140 F.R.D. 425 (D. Ariz. 1992) (denying motion to decertify class of more than 20,000 shareholders and bondholders); current employees never could represent former employees in benefit actions, *cf. Walsh v. Northrop-Grumman Corp.*, 162 F.R.D. 440, 447-48 (E.D.N.Y. 1995) (ERISA action; potential antagonism between current and former employees was too speculative to cause inadequate representation); and current employees who were the victims of racial or sexual discrimination never could represent each other, *cf. Orlowski v. Dominick's Finer Foods*, 172 F.R.D. 370, 374 (N.D. Ill. 1997) (any finding that named plaintiffs' interests conflict with those of class members "because all competed for a scarce number of promotion

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[6] *See also Kalodner v. Michaels Stores, Inc.*, 172 F.R.D. 200, 208 (N.D. Tex. 1997) (no conflict of interest between earlier and later purchasers of stock); *In re Cirrus Logic Sec. Litig.*, 155 F.R.D. 654, 663 (N.D. Cal. 1994) (same; current shareholder could adequately represent former shareholders); *Zinberg v. Washington Bancorp, Inc.*, 138 F.R.D. 397, 408 (D.N.J. 1990) (plaintiff who purchased stock based upon broker's advice could adequately represent those who did not).

opportunities" would "'doom[ ]'" every class action charging discrimination in promotion) (citation omitted).

This Court should reject the notion advanced by Petitioners and their *amici* that any sort of "intraclass conflict," no matter how potential, hypothetical, or theoretical, should be permitted to prevent class certification – or approval of a settlement – under Rule 23(a)(4)'s "adequacy-of-representation" requirement. Rather, as the courts and commentators have recognized, if the class members are united in interest against an outsider, that union outweighs any potential conflicts.

II. THE COURTS BELOW PROPERLY CERTIFIED A CLASS UNDER RULE 23(b)(1)(B)

A. The Rulings Of The Courts Below

Rule 23 provides that a class action may be maintained if the prerequisites of subdivision (a) are satisfied and, in addition, "the prosecution of separate actions by or against individual members of the class would create a *risk* of . . . adjudications with respect to individual members of the class which would *as a practical matter* be dispositive of the interests of the other members not parties to the adjudications or *substantially impair or impede* their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(B) (emphasis added). In this case, the district court certified the class under Rule 23(b)(1)(B), finding that "[t]he need to protect Class members' 'common interests' in the insurance proceeds subject to the coverage dispute demands a unitary resolution permitting equitable distribution," and that – absent a unitary resolution – a "significant risk" existed that "allowance of individual adjudications by class members" would result in the coverage being lost, and with it the class members' only prospect of meaningful recovery. CA 231a, 232a (162

F.R.D. at 526, 527). Moreover, as an *alternative* holding, the district court found that although Rule 23(b)(1)(B) "does not require" a limited fund, "there is a limited fund in this case." CA 233a (162 F.R.D. at 527) (citing 491a-492a) (Conclusions of Law, ¶¶37-39).

The Fifth Circuit affirmed the district court's analysis and conclusions, both in its original opinion, CA 72a-85a (90 F.3d at 982-88), and after remand from this Court, CA 2a-3a (134 F.3d at 670). NASCAT respectfully submits that, given the facts and circumstances of this case, the language and purpose of Rule 23(b)(1)(B), as well as relevant federal court precedents, the district court properly certified the Class and approved the settlement of this case, and the Fifth Circuit correctly affirmed that judgment.

B. The Language And Meaning Of Rule 23(b)(1)(B) And Its Prescribed Interpretation

As the district court observed, "Rule 23 is to be interpreted according to its 'plain meaning,' " 230a (162 F.R.D. at 526) (citing *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 123 (1989)), and the express language of subdivision (b)(1)(B) directs the lower courts to weigh the *practical* effect of separate actions upon class members. As emphasized by Professor Kaplan, the Reporter to the Advisory Committee when Rule 23 was revised in 1966:

> In new subdivision (b)(1)(B) the Committee took up a vantage point within the class, and spied out situations where lawsuits conducted with individual members *would have the practical if not technical effect* of concluding the interests of the other members as well, or of impairing the ability of the others to protect their own interests.

Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 388 (1967) (emphasis added). Subdivision (b)(1)(B) applies to "situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, *might do so as a practical matter*." Advisory Committee Notes to 1966 Amendments, 39 F.R.D. 69, 100-01 (1966) (emphasis added) ("Advisory Committee Notes").[7]

Because of this emphasis on the *practical* effects of separate adjudications, "the determination of whether a particular action falls within the ambit of the rule depends largely on the facts of each case." 7A Wright, Miller & Kane, § 1774, at 443. An examination of the reported cases demonstrates that the federal courts' construction and application of subdivision (b)(1)(B) has been motivated by the real life practical importance of providing people a collective procedure for remediating their claims when the alternative of leaving them to individual lawsuits creates a risk of prejudice, unequal treatment, or incomplete relief. Moreover, reference to the ample factual record in this case demonstrates that the district court conducted the requisite analysis of the facts

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[7] Other commentators on subdivision (b)(1)(B) concur. *See* 5 J. Moore, ¶23.42[1], at 23-172 ("Rule 23(b)(1)(B) focuses on the members of the putative class and seeks to protect them against situations in which they would be prejudiced by separate litigation. In order to warrant class certification. . . . the risk of prejudice need only be practical, not legal or technical.") 7A Wright, Miller & Kane, § 1774, at 437 (Rule 23(b)(1)(B) does not require that individual adjudications be legally binding on absentees; rather, it "simply states that separate actions 'as a practical matter' would affect the absent parties without giving them the protection of representation in the action.") (footnote omitted).

and the "substantial risk" facing class members and properly certified a Rule 23(b)(1)(B) non-opt-out class.

C. Rule 23(b)(1)(B) Permits Certification Of Non-Opt-Out Classes In Cases Involving "Common Risks" To Class Members, Not Just Cases Involving "Limited Funds"

Contrary to the assertions of Petitioners and their *amici*, *see* Pet. Brief. at 23-31; Trial Lawyers Brief at 7-13, although the Advisory Committee Notes to the 1966 amendment to Rule 23 enumerated several types of cases in which a class would be properly certified under subdivision (b)(1)(B), *see* 39 F.R.D. at 101-02, these examples are by no means exclusive. One commentary on the federal rules emphasizes that "[s]everal other types of actions not mentioned by the Advisory Committee have been accepted by the courts under Rule 23(b)(1)(B)." 7A Wright, Miller & Kane, § 1774, at 445. Thus, although class certification under subdivision (b)(1)(B) is authorized in so-called "limited fund" cases,[8] and the district

[8] Class certification in cases involving a "limited fund" was clearly envisioned by the drafters of modern Rule 23(b)(1)(B). *See* Advisory Committee Notes, 39 F.R.D. at 101 ("In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. *This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims.*") (emphasis added); *see also* 7A Wright, Miller & Kane, § 1774, at 441 ("An obvious example of the type of action to which Rule 23(b)(1)(B) is applicable is one in which the class members have claims against a fund that may prove insufficient to satisfy all of them.") (footnote and citations omitted); 5 J. Moore, ¶23.42[2][a], at 23-172 ("The most common use of Rule

court and Fifth Circuit properly reached the alternative holding that this case fits within that category, *see* CA 233a-234a (162 F.R.D. at 527), CA 72a-85a (90 F.3d at 982-88), affirmance in this Court need not exclusively rest upon a finding that a "limited fund" existed. *See* Advisory Committee Notes, 39 F.R.D. at 100-01.[9] In numerous reported cases that Petitioners ignore, the federal courts have properly certified classes under subdivision (b)(1)(B) because class members – whether plaintiffs *or* defendants – faced an unacceptable (but common) risk if they could not achieve a unitary resolution.

In *In re Alexander Grant & Co. Litigation*, 110 F.R.D. 528 (S.D. Fla. 1986), a securities fraud action, defrauded investors sought to certify over 300 partners in a national accounting firm (Grant) as a defendant class. Observing that the alternative to certification of a subdivision (b)(1)(B) class would require plaintiffs to conduct separate trials against the individual accounting partners, a result which it found would "unduly delay and postpone the ultimate resolution of the cases," *id.* at 537, the court stated that such piecemeal litigation, as a practical matter, would create an unacceptable risk for each putative class member:

23(b)(1)(B) class actions is in 'limited fund cases.' ") (footnote omitted).

[9] *See* CA 491a (Conclusions of Law, ¶37) ("A class may be certified under Rule 23(b)(1)(B) irrespective of whether a 'limited fund' may be said to exist.") (citing *White v. National Football League*, 822 F. Supp. 1389, 1411 (D. Minn. 1993), *aff'd on other grounds*, 41 F.3d 402 (8th Cir. 1994), and *Specialty Cabinets & Fixtures v. American Equitable Life Ins. Co.*, 140 F.R.D. 474, 477 (S.D. Ga. 1991)).

> [A] finding in the first trial that a Grant partner was responsible for authoring financial statements containing materially misleading information would substantially bar the other partners from asserting a contrary position. Thus, these partners would be foreclosed from defending their interests. . . .
>
> [T]he court finds that the only method for protecting the rights of Grant partners is to require their appearance, at one time, before this court. Thus, they will not be faced with an inability to defend their interests owing to a prior determination on the primary issue of liability.

Id. at 537-38 (footnote and citations omitted). In *Alexander Grant*, the district court also "note[d] the practical problem" presented by denying certification under subdivision (b)(1)(B): "Should individual partners be allowed to opt-out, this court faces the likely prospect of relitigating identical issues of law and fact in several trials. This occurrence would place an unnecessary burden upon the judicial system." *Id.* at 538.[10]

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[10] As in this case, *see* CA 233a-234a (162 F.R.D. at 527), in *Alexander Grant*, 110 F.R.D. at 538, the district court alternatively held that a "limited" (or "common") fund existed, thereby justifying (b)(1)(B) certification:

> Additional consideration must also be given to protecting the [accounting] partners' interests in a common fund – their professional liability insurance coverage. Separate adjudications conceivably would exhaust coverage leaving subsequently tried partners to pay legal fees from their own pocket and leave them with only personal assets from which to compensate plaintiffs. Thus, this court must concern itself with the interests of all partners while keeping an eye on the conservation of both partnership and individual assets.

Alexander Grant was followed by Chief Judge Ziegler in *In re Phar-Mor, Inc. Securities Litigation*, 875 F. Supp. 277 (W.D. Pa. 1994), another securities fraud action brought against an accounting firm (Coopers). The district court granted plaintiffs' motion to certify partners of the accounting firm as a defendant class under subdivision (b)(1)(B) because "the prosecution of separate actions would substantially impair the ability of the individual class members to protect their interests," and elucidated the common "significant risk" faced by class members:

> Because, under the theory of joint and several liability, all partners are legally responsible for the negligence of a single partner, a finding of liability against Coopers and any of the representative partners or principals would have a substantial effect on the interests of the putative class members. . . . Here, a finding that the negligent or fraudulent acts of a partner or partners were responsible for plaintiffs' losses would effectively foreclose any defense by the putative class members.

Id. at 280.[11]

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110 F.R.D. at 538. *Accord Alexander Grant & Co. v. McAlister*, 116 F.R.D. 583, 590 (S.D. Ohio 1987) (granting certification of class of counter-defendant accounting partners under Rule 23(b)(1)(B) because if investors' "class claims were tried in many separate suits, the first determination would practically dispose of the later ones, as earlier liability determinations could be used against individual partners in later cases").

[11] In *Phar-Mor*, 875 F. Supp. at 280, the district court reached the same alternative holding as in *Alexander Grant*, 110 F.R.D. at 538, as to the existence of a "common" (read "limited") fund, *see* note 10, *supra*, stating that "[s]uch concerns are also relevant here, where Coopers' insurance funds have been and will continue to be depleted during the prosecution of the

Phar-Mor was followed by Judge Lee in *In re Chambers Development Securities Litigation*, 912 F. Supp. 822 (W.D. Pa. 1995), a securities fraud action in which the district court certified a defendant class of 250 accounting partners under Rule 23(b)(1)(B) and (b)(3); the district court stated that "[a]s in *Phar-Mor*[ ], the prosecution of separate actions against individual Grant Thornton partners would substantially impair the ability of the individual class members to protect their interests, and fully comports with due process concerns." *Id.* at 836.

In these cases, as in the present case, the trial courts properly found that the potential prosecution of separate actions ("piecemeal litigation") created a "substantial risk" of impairment of individual class members' rights and interests, as Rule 23(b)(1)(B) requires, whether those class members were plaintiffs *or* defendants. In *Alexander Grant*, *Phar-Mor*, and *Chambers Development*, the class members – individual partners in accounting firms who had been sued for securities fraud – faced the practical risk of being unable to defend themselves if piecemeal litigation was conducted and one or more of the early cases established liability on the part of any one of them. While the common risk they shared was a function of partnership law, it is analogous to the common risk shared by class members in this case, as found by the district court: That the insurance coverage dispute would proceed absent a unitary resolution and would present a "substantial probability" that Fibreboard's claimed

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[defrauded investors'] actions, with the possible result that little or no funds will be available for the putative class members to use in defense of any claims brought against them in separate actions." 875 F. Supp. at 280.

insurance coverage – the class members' only source of recovery – would be lost. CA 230a-231a (162 F.R.D. at 526).

Petitioners and their *amici* ignore another body of related (and relevant) cases wherein classes are certified under subdivision (b)(1)(B) because the prosecution of separate actions could create a risk of inconsistent or varying adjudications. For example, in *Becher v. Long Island Lighting Co.*, 164 F.R.D. 144 (E.D.N.Y. 1996), an ERISA and state law action brought by current and former employees against their employer, its pension plan, and the plan administrator, the court found that the failure to certify a class of current and former employees who withdrew contributions from an employer-sponsored pension plan and sought to challenge a determination that their withdrawals resulted in a forfeiture of certain pension benefits would create a risk of inconsistent adjudications. The court observed that "[f]ailure to certify the class could result in multiple suits regarding the trustees' interpretation of" the plan, and "[e]ach case could conceivably result in different courts reaching conflicting decisions regarding not only the Plan's interpretation but also the applicability of the various defenses the defendants seek to impose." *Id.* at 153.[12]

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[12] *See also Death Row Prisoners of Pennsylvania v. Ridge*, 169 F.R.D. 618, 623 (E.D. Pa. 1996) (certifying class consisting of all present and future state death row inmates who had not yet filed petitions for habeas corpus review to challenge state's status under federal Antiterrorism and Effective Death Penalty Act); *White*, 822 F. Supp. at 1409 (in professional football players' antitrust class action against NFL challenging league's employment practices, finding that if individual players filed separate actions seeking injunctive relief, there was a substantial risk of inconsistent or varying adjudications).

The same "substantial risk" of piecemeal litigation which would invariably lead to inconsistent or varying adjudications regarding the availability and extent of Fibreboard's insurance coverage was clearly present in this case. The district court found that this coverage dispute (and, thus, the common risk to the class) could be resolved "only" through a unitary class action under Rule 23(b)(1)(B). CA 241a (162 F.R.D. at 530). As Judge Parker elaborated:

> Resolution of the insurance dispute required a unitary settlement in a proceeding in which all claims were compromised. On these facts, allowance of individual adjudications by class members would have destroyed the opportunity to compromise the insurance coverage dispute . . . and would have exposed the class members to the very risks that the settlement addresses – a situation that falls squarely under Rule 23(b)(1)(B).

CA 490a (Conclusions of Law, ¶35) (citations omitted); *see also* CA 231a-233a (162 F.R.D. at 526-27).

D. Rule 23(b)(1)(B) Also Permits Certification Of Non-Opt Out Classes In Cases Involving "Limited Funds"

As an *alternative* holding, the district court found that "the 'limited fund' may be viewed as the sum of the value of Fibreboard plus the value of its insurance coverage. . . . Under this scenario, the limited fund would equal at most approximately $1.77 billion." CA 492a (Conclusions of Law, ¶39) (citations omitted); *see also* CA 73a (90 F.3d at

982).[13] Rule 23 is intended to apply "when claims are made by numerous persons against a fund insufficient to satisfy all claims," Advisory Committee Notes, 39 F.R.D. at 101, and, under such circumstances, subdivision (b)(1)(B) " 'is designed to preserve the limited fund for the entire class against the individual claims of class members,' which claims might otherwise exhaust the limited fund and thereby leave subsequent plaintiffs with no remedy." *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1303 (2d Cir. 1990) (citations omitted). Class certification in "limited fund" cases is intended to "ensure that allocation of defendant's finite funds does not depend on which party rushes to the courthouse first

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[13] In this case, the district court properly held that "Rule 23(b)(1)(B) certification does not require a fixed asset or piece of property in which all class members have a preexisting interest." CA 489a (Conclusions of Law, ¶34); *see also* CA 233a-234a (162 F.R.D. at 527). As one treatise defines a "limited fund":

> A limited fund case is an action in which any recovery will come from a fixed pool of assets that is or may be insufficient to satisfy all of the claims against the fund. The fund must be the plaintiffs' sole source of recovery.
>
> *If the assets of the defendants, as extended by applicable insurance coverage but as limited by the insurers' assets, is insufficient to satisfy all of the plaintiffs' claims, the sum of those assets constitutes a limited fund. . . .*

5 J. Moore, ¶23.42[2][a], at 23-172 to 23-173 (emphasis added; footnotes omitted). Judge Parker's alternative holding – that the "limited fund" may be viewed as the sum of Fibreboard's net asset value plus the value of its insurance coverage, CA 492a (Conclusions of Law, ¶39) – fits squarely within the underscored language quoted above.

or chooses a courthouse that can render swifter results than others." 5 J. Moore, ¶23.42[2][a], at 23-173; *see also Coburn v. 4-R Corp.*, 77 F.R.D. 43, 45 (E.D. Ky. 1977) (Rule 23(b)(1)(B) certification granted: "In no event . . . should this litigation become an unseemly race to the courtroom door with monetary prizes for a few winners and worthless judgments for the rest."), *mandamus denied sub nom. Union Light, Heat & Power Co. v. United States District Court*, 588 F.2d 543 (6th Cir. 1978); *United States Trust Co. of New York v. Alpert*, 163 F.R.D. 409, 419 (S.D.N.Y. 1995) (same; "The Fund herein is . . . a finite one that would be depleted with each payout and would not be sufficient to pay all claimants. Its distribution should not depend on who rushes to the courthouses first or chooses those courthouses that can render swifter results than others.").[14]

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[14] As Professor Miller put the matter:

> The paradigm Rule 23(b)(1)(B) case is one in which there are multiple claimants to a limited fund . . . and there is a risk that if litigants are allowed to proceed on an individual basis those who sue first will deplete the fund and leave nothing for latecomers.

Arthur R. Miller, *An Overview of Federal Class Actions: Past, Present and Future* 45 (Fed. Jud. Center 1977). *See also In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 735 (2d Cir. 1992) (defining "classic instance of a 'limited fund' " as where "a group of claimants asserted claims of an aggregate amount that would deplete a fixed sum of money" and explaining that "a (b)(1)(B) class action is appropriate to avoid an unfair preference for the early claimants"); *In re "Agent Orange" Prods. Liab. Litig.*, 100 F.R.D. 718, 725 (E.D.N.Y. 1983) (same), *aff'd*, 818 F.2d 145 (2d Cir. 1987).

The wealth of precedent involving limited fund cases has delineated the circumstances under which class certification will be permitted; in the words of one commentary:

> The availability of an action under subdivision (b)(1)(B) in this context not only is fair to all members of the class but it eliminates a serious threat of multiple litigation. *But the limited nature of the funds available to satisfy the individual claimants must be clear; a mere allegation that defendant has limited resources will be insufficient.*

7A Wright, Miller & Kane, § 1774, at 443 (footnote omitted).[15] As a result, when such proof is not adduced, or when the district court fails to require it or properly analyze it, certification under subdivision (b)(1)(B) will not be granted by the trial court or it will be reversed on appeal. *See, e.g., In re Bendectin Products Liability Litigation*, 749 F.2d 300, 305-06 (6th Cir. 1984) (district court was "clearly erroneous" in certifying (b)(1)(B) class in products liability action brought by persons exposed *in utero* to prescription drug to recover for injuries because certification order "state[d] without support" that "limited fund" existed and "[n]o findings were made on the record as to this conclusion").[16]

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[15] *See also* 5 J. Moore, ¶23.42[2][c], at 23-175 (to obtain Rule 23(b)(1)(B) certification "on the basis of a limited fund, a party must submit specific evidence showing that the fund may be depleted through individual litigation before all members' claims can be satisfied"); *In re First Commodity Corp. Consumer Accounts Litig.*, 119 F.R.D. 301, 312 (D. Mass. 1987) (same).

[16] *Compare In re Dennis Greenman Secs. Litig.*, 829 F.2d 1539, 1545-46 (11th Cir. 1987) (certification of class on basis that some plaintiffs might bankrupt potential sources of recovery if allowed to proceed individually was improper, absent specific

In this case, the district court heard eight days of testimony, including 18 witnesses, considered hundreds of documents and made extensive findings as to the

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findings of defendants' financial status); *In re Northern District of Calif. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 851-52 (9th Cir. 1982) (error to certify a limited fund punitive damages class without hearing evidence of defendant's net worth, earnings, or available insurance coverage and establishing "as a fact" that defendant's assets were too limited to permit conventional litigation); *Clarke v. Advanced Private Networks, Inc.*, 173 F.R.D. 521, 522-23 (D. Nev. 1997) (same); *In re Telectronics Pacing Sys., Inc. Prods. Liab. Litig.*, 172 F.R.D. 271, 285 n.9 (S.D. Ohio 1997) ("The Court cannot certify a limited fund class without making findings concerning the existence of a limited fund"); *Fogie v. Rent-A-Center*, 867 F. Supp. 1398, 1403 (D. Minn. 1993) ("limited fund" doctrine could not be invoked when plaintiff consumers "have not produced evidence that there is a limited fund to satisfy judgment"); *with Doe I v. Karadzic*, 176 F.R.D. 458, 463 (S.D.N.Y. 1997) (in action brought on behalf of persons who suffered human rights violations at hands of Bosnian-Serb forces, certification was proper to preserve limited fund for benefit of entire class; "Class certification will prevent a situation where one plaintiff lays claim to the lion's share of defendant's limited resources, leaving thousands of others with nothing simply because they lost the race to the courthouse."); *"Agent Orange"*, 100 F.R.D. at 727 (following evidentiary hearing, district court concluded that there was "substantial probability that punitive damages, if allowed will, when added to compensatory damages, exceed defendants' assets"); *Coburn*, 77 F.R.D. at 45 (certification granted in personal injury and wrongful death actions arising from fire at supper club; plaintiffs demonstrated that claims in excess of $1.5 billion "have already been asserted in the suits now on file," judgments in the 164 actions for wrongful death "might reasonably exceed" $16 million, "[d]amages for injuries are not calculable at this stage" and defense counsel advised court that the corporate defendant had $3 million in assets).

existence of a "limited fund." *See, e.g.*, CA 491a (Conclusions of Law, ¶38) (citing CA 266a-272a, 291a-332a and 347a-348a) (Findings of Fact, ¶¶36-47, 89-181 and 203). These findings were properly affirmed by the Fifth Circuit. *See* CA 72a-85a (90 F.3d at 982-88), CA 2a (134 F.3d at 670). Indeed, the Fifth Circuit's original opinion in this case was followed by Judge Bechtle in *In re Orthopedic Bone Screw Products Liability Litigation*, 176 F.R.D. 158 (E.D. Pa. 1997), a products liability action brought against the manufacturer of pedicle screws (AcroMed). A "limited fund" class was certified because the parties offered evidence and expert testimony demonstrating that defendants' "net assets and insurance coverage are vastly insufficient to satisfy the many claims against them" and the "anticipated defense costs" to be incurred by the corporate defendant (AcroMed) "will alone be sufficient to consume [its] asset base"; Judge Bechtle observed that "[a]fter incurring those defense costs, AcroMed would have little or no ability to pay settlements or judgments to plaintiffs in individual cases." *Id.* at 177. Noting that the settlement would enable AcroMed to borrow $100 million and thereby increase the amount available to claimants, the district court analogized that case to this case:

> [T]here is neither a challenge, nor a basis for a challenge to the notion that this settlement can not be funded from cash on hand or from the liquidation of existing assets. It will be funded from an outside infusion of $100 million of borrowed funds not otherwise available except for the terms of the settlement. In this respect, this case shares much in common with *Ahearn*. In both cases, the settlement funds are provided

> primarily by non-defendants who have no obligation to provide them.

Id.

As the district court did in this case, in *Orthopedic Bone Screw* Judge Bechtle focused on the real life practical risks facing class members *and* the corporate defendant if Rule 23(b)(1)(B) certification was denied and the litigation continued with the foreseeable race to the courthouse and race to early judgments, necessarily taking into account the "unassailable history" of the litigation up to that point in time:

> In this case it is important to re-emphasize that it is the settlement itself that creates the fund from otherwise unobtainable outside resources. This infusion of new money is the *sine qua non* of the settlement. Without this infusion, the settlement cannot be accomplished and without the settlement, AcroMed will consume itself by exhausting all of its resources including its traditional borrowing potential. Because it is prudent to conclude from the unassailable history of this litigation that AcroMed can neither win nor avoid defending all of the cases presently proceeding against it, the conclusion that is equally unassailable is that the settlement is crafted around a limited fund. An unwillingness to recognize this will lead to the unacceptable result of many deserving claimants being unable to recover by settlement or judgment. This will surely follow the exhaustion of AcroMed's assets by either substantial use of resources in defense of all of the cases which course will be shortened by payments of recoveries by claimants earlier in time. This settlement shuts off AcroMed's defense cost flow and places all claimants on the same plane, at the same time, with respect to AcroMed's financial capacity to

> respond to all of the claims, leaving each claimant's share to be determined by traditional application of equitable distribution standards. If this settlement fails, the funds that AcroMed can raise conditioned on the settlement going forward will of course not be available to class members. The loss of the settlement fund is therefore a "risk" within the meaning of Rule 23(b)(1)(B).

176 F.R.D. at 177 (citation omitted).

In their discussion of so-called "limited fund" cases, Petitioners and their *amici* pay scant attention to the Second Circuit's opinion in *Drexel*, which approved Judge Pollack's certification of a mandatory non-opt-out class in securities litigation brought against the bankrupt brokerage firm.[17] In that case, Drexel agreed to create a $350 million fund to be administered by the SEC, which was to distribute the fund to the victims of Drexel's illegal transactions in "junk bonds." 960 F.2d at 288. Drexel paid $200 million into the SEC Fund in September 1989 and agreed to pay the remaining $150 million in two installments over the next three years. However, in February 1990 (before Drexel had paid any of the remaining $150 million), it filed a Chapter 11 bankruptcy petition. *Id.* To facilitate settlement of 850 claims arising out of Drexel's actions in buying, selling, and underwriting securities, Judge Pollack withdrew these claims from the bankruptcy

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[17] In this case, both the district court and the Fifth Circuit cited *Drexel* with approval. *See* CA 489a & n.2 (Conclusions of Law, ¶33), CA 231a-232a (162 F.R.D. at 526), CA 74a (90 F.3d at 983) (stating that in *Drexel*, 960 F.2d at 292, "the Second Circuit approved a [Rule] 23(b)(1)(B) class action on the ground that individual litigation would reduce the recovery for all plaintiffs from Drexel's limited assets").

court and ordered the establishment of the Securities Litigation Claimants Group, which eventually negotiated a settlement under which Drexel would pay the $150 million balance it owed the SEC Fund and the $350 million total would be divided between two subclasses. *Id.*[18]

Affirming Judge Pollack's certification of a (b)(1)(B) class and approval of the settlement agreement, the Second Circuit found the requirements of Rule 23 to have been satisfied:

> Drexel's assets to satisfy the Securities Claims are finite. A succession of individual actions to determine Drexel's liability on each claim would involve costly litigation, thereby depleting Drexel's already limited resources. The diminution of Drexel's estate from protracted litigation would doubtless reduce the amount ultimately recovered by each member of the putative class.

960 F.2d at 292 (citing *Robertson v. National Basketball Ass'n*, 556 F.2d 682, 685 (2d Cir. 1977)). Recognizing that "the limited fund here is quite different from the limited fund present in most class actions" certified under subdivision (b)(1)(B), in *Drexel* the court of appeals nevertheless found that the facts and circumstances of the case fit within Rule 23's necessarily broad and flexible confines

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[18] Petitioners characterize *Drexel* as holding that Rule 23 (b)(1)(B) certification was only "appropriate in connection with bankruptcy reorganization of Drexel's 'estate,' " Pet Brief. at 34 n.31 (citing *Drexel*, 960 F.2d at 288-92), ignoring the fact that Judge Pollack *withdrew* the securities claimants' claims from the bankruptcy court. The Second Circuit's opinion upholding certification of a subdivision (b)(1)(B) "limited fund" class in *Drexel* was in no way limited to cases involving bankruptcy reorganizations.

and affirmed Judge Pollack's approval of a non-opt-out class:

> [E]ven though Drexel's assets will not be distributed to claimants until final approval of Drexel's reorganization plan, some members of the putative class might attempt to maintain costly individual actions in the hope and, perhaps, the belief that their claims are more meritorious than the claims of other class members. A mandatory class action under Rule 23(b)(1)(B) is thus necessary here to prevent claimants with such motivations from unfairly diminishing the eventual recovery of other class members.
>
> For the same reasons that we find that the class can be maintained under Rule 23(b)(1)(B), we hold that the district court did not abuse its discretion in prohibiting any member of the putative class to opt out of the class. To allow a class member to opt out would involve costly litigation to estimate the amount of that member's claim, thereby reducing Drexel's already-limited fund of assets.

Id.

In this case, the district court and the Fifth Circuit followed the letter and spirit of Rule 23(b)(1)(B), as well as the reported cases cited and discussed above, conducted a thorough analysis of the facts and circumstances facing putative Class members and Fibreboard, and properly concluded that certification of a "limited fund" class was proper. *See* CA 233a-234a (162 F.R.D. at 527); CA 491a-492a (Conclusions of Law, ¶¶37-40); CA 72a-85a (90 F.3d at 982-88); CA 2a-3a (134 F.3d at 670). In any event, this was an *alternative* holding both of the district court and the appellate court. Thus, the decision of the Fifth

Circuit can be affirmed by this Court on the common "substantial risk" provision of Rule 23(b)(1)(B) alone.

CONCLUSION

For the reasons stated, NASCAT respectfully submits that the decision of the Fifth Circuit should be affirmed.

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Respectively submitted,

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